Petition

81-1389

No. -

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In the Supreme Court of the United States.

OCTOBER TERM, 1981.

MELVIN GOLDENBERG,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

I. Did the First Circuit commit error by holding, in conflict with decisions of the United States Supreme Court and of at least six circuit courts, that a defendant is never entitled to the instruction that the jury may acquit on good character evidence "standing alone" even in this case of witness credibility where the defendant's character witnesses included several senior representatives of the law enforcement community?

II. Did the First Circuit err in affirming the trial court's refusal to await the defendant's evidence before instructing the jury in mid-trial that it could consider the hearsay statements of the one witness as against all defendants, in violation of the circuit's own standards and in conflict with this Court's teachings in *Glasser* v. *United States* and *Ohio* v. *Roberts*?

III. Did the First Circuit erroneously decide an important question of federal law which has not been but should be settled by this Court when it held that a jury instruction resulting in a mandatory presumption against a defendant, found unconstitutional in *Sandstrom* v. *Montana* and described as always error by the Court of Appeals, was somehow harmless beyond a reasonable doubt in the District of Massachusetts in this case?

IV. Did the First Circuit so depart from the accepted and usual course of judicial proceedings in ignoring concessions and findings in the record as to misapply the standards of *United States* v. *Agurs* and thus leave unsatisfied a mandate of *Brady* v. *Maryland* with respect to specifically requested concededly exculpatory materials?

Petitioner Melvin Goldenberg* prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the First Circuit which were entered in this case on October 30, 1981 affirming the Petitioner's conviction and the denial of his motion for new trial, petition for rehearing and rehearing *en banc* having been denied on November 25, 1981.

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* In addition to the Petitioner, the following were Defendants-Appellants in the Court of Appeals: Howard T. Winter, Elliot Paul Price, James DeMetri, Charles DeMetri, and James Martorano.

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MELVIN GOLDENBERG,
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v.

UNITED STATES OF AMERICA,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Opinions Below.

The United States Court of Appeals for the First Circuit issued an opinion in the case on October 30, 1981, under the title *United States of America* v. *Howard T. Winter, et al* affirming the conviction of the Petitioner. After a Petition for Rehearing or Rehearing En Banc, the Court of Appeals entered an Order of Court on November 25, 1981 making certain changes in the opinion. The opinion is not yet reported in the Federal Reporter, 2nd Series and is set forth at App. 1a-65a, hereto. The Order of the Court is set forth at App. 67a-69a, hereto.

The United States Court of Appeals for the First Circuit issued an opinion on October 30, 1981, under the title *United States of America* v. *James Martorano, et al* affirming the denial of the Petitioner's post-sentencing motion for new trial and denial of an evidentiary hearing thereon. The opinion is not yet reported in the Federal Reporter, 2nd Series, and is set forth at App. 71a-85a, hereto.

The United States District Court for the District of Massachusetts which tried the case and heard the post-sentencing Motion for New Trial issued an unreported Memorandum and Order on December 12, 1980 denying that Motion which is set forth at App. 89a-99a, hereto.

Jurisdiction.

Judgments were entered by the Court of Appeals for the First Circuit affirming the conviction of the Petitioner and affirming the denial of his motion for new trial on October 30, 1981. A petition for rehearing or rehearing *en banc* timely filed was denied by order of the Court of Appeals entered on November 25, 1981.

The Supreme Court has jurisdiction of this Petition under 28 U.S.C. § 1254(1) and Rules 20.1 and 20.4.

Statement of the Case.

The Petitioner Melvin Goldenberg, a thirty-year resident of Las Vegas, Nevada and career executive employee of various gambling casinos there, was convicted of a so-called RICO conspiracy under 18 U.S.C. § 1962(d) and of sports bribery and travel act violations of 18 U.S.C. §§ 224 and 1952 after a forty-six day trial (including five days of jury deliberation) with eight other defendants.

The indictment alleged a conspiracy masterminded by one Anthony Ciulla, a convicted felon and master racetrack cheat, to fix thoroughbred horse races in which the Petitioner's alleged role was to provide Ciulla and his Eastern racketeer associates with "connections" in Las Vegas to "get down" bets there through legal and illegal bookmakers. The only evidence admitted to support the indictment against the Petitioner was Ciulla's uncorroborated immunized testimony that he met in Las Vegas with Goldenberg and telephoned him on occasion, and a toll record of three telephone calls, on the day of or before a fixed race, from a location associated with Ciulla to the switchboard of the large hotel-casino where Goldenberg worked as a host, but not personally to the Petitioner.

The Petitioner's defense was his own testimony denying any relationship whatsoever with Ciulla as claimed by the master-fixer and the testimony of several witnesses who swore to the Petitioner's good character and reputation. Those witnesses were described in the Court of Appeals opinion as follows:

> Among them were the director of hotel operations at the Stardust Hotel in Las Vegas, where Goldenberg was employed from April 8, 1968 through October 8, 1974; a lieutenant in the Las Vegas police department, who from August 1974 to August 1977 headed the intelligence unit that gathered information on gambling, and who was, as a result, familiar with Goldenberg's general routine; the Director of Security for the Sheraton Corporation, who also spent 14 of his 26 years as an FBI agent in Las Vegas, and whose tasks from 1973 to 1977 included investigating interstate sports betting and bookmaking; a retired FBI agent who had been assigned to Las Vegas from 1971 through 1977 and had headed the intelligence squad that gathered gambling information from 1975 to 1977; and an undersheriff of the Las Vegas police department. (App. 47a-48a).

The Petitioner requested that the District Court take at least two steps during the trial* to protect him from drowning in the mass trial in which he found himself, three thousand miles away from his home and place of employment:

(1) He asked the trial judge to defer his findings as to the admissibility of co-conspirator evidence against the Petitioner until after the close of all evidence in the case (which would include his own testimony and his good character evidence) rather than ruling immediately after Ciulla had testified. The judge refused to do this and so, from the twenty-first trial day to the end, the jury was allowed to consider all of the evidence introduced at trial about all of the defendants when determining the participation of any of the defendants including Petitioner. This denial gave rise for the *Petrozziello-Ciampaglia* issue presented in this Petition *infra* at pp. 12-18.

(2) He asked the trial judge to include in his instruction to the jury a statement of the law, acknowledged by this Court and several circuits other than the First Circuit, that good character evidence "alone" and "proof of a good reputation for honesty, veracity and integrity . . . may well by itself, if believed by the jury, create such a reasonable doubt as to justify acquittal notwithstanding the convincing nature of other evidence in the case." The judge refused this request and instructed merely that "such evidence may indicate . . . that it is improbable that a person of good character would commit the crimes charged, and, therefore, cause you to have a reasonable doubt — you should consider this evidence along with all of the other evidence in the case in determining the guilt or innocence of the defendant." The endorsement of this instruction and rejection of the requested instruction by the First Circuit places that circuit in conflict with a decision of this Court,

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* Before trial the Petitioner had moved unsuccessfully for severance and transfer to the District of Nevada.

Michelson v. *United States*, 335 U.S. 469 (1948), and decisions of other circuits.

The trial court also instructed the jury that the Petitioner "is presumed to intend the natural and probable consequences of his acts." The holding of the Court of Appeals that this instruction, in conflict with *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), was "harmless error" further presents an issue for review by this Court.

Finally, the denial by the trial court of Petitioner's post-sentencing motion for new trial based upon the discovery of exculpatory evidence not furnished by the Government was affirmed by the Court of Appeals by applying the standard of review of *United States* v. *Agurs*, 427 U.S. 97 (1976), as if the Petitioner's requests had not been specific, whereas they were found by the District Court and conceded by the Government to be, and were, in fact, as specific as the English language is capable of articulation. Hence, the First Circuit's decision constitutes an uncharacteristic emasculation of *Brady* v. *Maryland*, 373 U.S. 83 (1963), from a court independent enough to have produced *United States* v. *Turkette*, 632 F.2d 896 (1st Cir. 1980), *rev'd.*, U.S. , 101 S.Ct. 2524 (decided June 17, 1981).

Reasons for Granting the Writ.

I. By Holding That a Defendant is Never Entitled to the Instruction That the Jury May Acquit on Good Character Evidence "Standing Alone," the First Circuit has Admittedly Refused to Follow Established Decisions of the Supreme Court, Challenging This Court to Reconsider Its Reading of Its Own Prior Cases, and Confessing to a Tension Between the Circuits on This Recurring Feature of Federal Criminal Trials Which Cries Out for Final Resolution Here.

This Court has twice declared that character evidence *alone* may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed. In *Edgington* v. *United States*, 164 U.S. 361, 366 (1896), the Court stated:

> The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would *alone* create a reasonable doubt, *although without it the other evidence would be convincing*. (Emphasis added).

In *Michelson* v. *United States*, 335 U.S. 469, 476 (1948), the Court stated, citing *Edgington*:

> [The defendant] may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for *this Court has held that such testimony alone, in some circumstances, may be enough*

> *to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed.* (Emphasis added.)

The correctness of the Court's statement has met with wide agreement so that "[i]t is now generally agreed that evidence of the defendant's established reputation for good character, if it is relevant to the issue, may alone create a reasonable doubt in the minds of the jury as to the defendant's guilt where without it the other evidence may be convincing. 30 Am. Jur. 2d, Evidence § 1127, citing *Edgington*.

The "generally agreed" statement, *ibid*, is, however, not universal, although it should be in a national criminal justice system. As the First Circuit stated in its opinion below, "the circuit courts, despite this language in *Michelson*, have split on the permissibility of a good character 'standing alone' charge." *United States* v. *Winter*, (App. 49a-50a).* In *Winter*, after implying that the Supreme Court in *Michelson* "may have misread *Edgington*" (App. 49a), the First Circuit challenges the wisdom of the instruction, reiterating its "disapproval of the doctrine [requiring the "standing alone" instruction] as set forth in *Oertle* v. *United States*, 370 F.2d at 726-727."

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* See, following the instructions of the Supreme Court: *United States* v. *Foley*, 598 F.2d 1323, 1337 (4th Cir. 1979); *United States* v. *Darland*, 626 F.2d 1235, 1238 (5th Cir. 1980); *United States* v. *Hewitt*, 634 F.2d 277, 278 (5th Cir. 1981); *Roth* v. *United States*, 294 F. 475 (6th Cir. 1923); *United States* v. *Donnelly*, 179 F.2d 227, 233 (7th Cir. 1950); *Oertle* v. *United States*, 370 F.2d 719, 726-727 (10th Cir. 1966) (en banc), *cert. denied*, 387 U.S. 943 (1967); *United States* v. *Lewis*, 482 F.2d 632, 637 (D.C. Cir. 1973).

Refusing to follow the instructions of the Supreme Court: *United States* v. *Fayette*, 388 F.2d 726, 727 (2nd Cir. 1968); *Black* v. *United States*, 309 F.2d 331, 343-344 (8th Cir. 1962), *cert. denied*, 372 U.S. 934 (1963); *Carbo* v. *United States*, 314 F.2d 718, 746-747 (9th Cir. 1963), and the First Circuit in *United States* v. *Winter*, below.

In *Oertle*, the Tenth Circuit stated, at 727:

> A reconsideration of Edgington and Michelson convinces us they do not compel the giving of the "standing alone" instruction in every case in which evidence of good character has been admitted. *The circumstances of a particular case may require it*, as stated in both Edgington and Michelson. *Such circumstances would certainly exist* when an accused presented only evidence of good character and rested his defense upon this evidence coupled with the failure of the prosecution to sustain the burden of proof. There may be other circumstances requiring the giving of such instruction but we will not attempt here to anticipate them. (Emphasis added.)

In the instant case, as in *Michelson* itself, the defendant's entire defense consisted of high quality character testimony* and his own denial. It is in just these circumstances, at least, that a defendant is entitled to the "standing alone" instruction. This instruction is not, as the First Circuit incorrectly suggested in *Winter* (App. 51a), a usurpation of the jury's function.

Character evidence is clearly of a different species than other evidence in a criminal trial. The "standing alone" instruction does not tell the jury how much weight it can or may give this evidence; it instead instructs lay people *how* it *may weigh* this unique type of evidence in its determinations. As the court stated in *Snitken* v. *United States*, 265 F. 489, 492 (7th Cir. 1920), it provides the jury with the legal scales:

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* See *supra* p. 3, quoted from *Winter* (App. 47a-48a), for a listing of the senior law enforcement officials who testified as character witnesses on behalf of defendant.

> Thus the court placed the evidence respecting good reputation on the same basis as the evidence relating to the substantive acts charged in the indictment, and directed the jury to give it such weight as they might think it entitled to, without furnishing them the *legal scales* in which to weight it, namely, that a reputation for good character, if established, *alone may create a reasonable doubt*, although without it the other evidence would be convincing of guilt. (Emphasis added.)

See also *Egan* v. *United States*, 287 F. 958, 969 (C.A.D.C. 1923), where the court stated, quoting *State* v. *Brown*, 115 Pac. 994 (1911):

> To tell the jury that they should consider good character in connection with all other evidence in the case is, as stated by the California courts [cite omitted], not telling them anything beyond letting in the evidence. . . . A mere charge which admonishes the jury to consider good character in connection with all the other evidence, and which directs them that if, on a consideration of all of it, including good character, they entertain a reasonable doubt of guilt, to acquit the accused, is not charging the jury on the rules or principles of law applicable to evidence of good character, or stating the object or purpose for which it may be considered, its sufficiency as evidence to support a reasonable doubt of guilt, or the legal effect which the jury in their judgment may give to it.

The critical nature of the word "alone" as part of the jury instruction has been recognized. See *Bird City Equity Mercantile Exchange* v. *United States*, 338 F.2d 790, 792 (10th

Cir. 1964). So also, in a case admitted by the trial judge to be in at least one aspect as "most troublesome" (App. 94a) and by the circuit court to be based on testimony of Ciulla marked by "striking inconsistencies" (App. 18a) errors as to credibility cannot be dismissed as "harmless." See *United States* v. *Donnelly*, 179 F.2d 227 (7th Cir. 1950).

By now refusing to permit the "standing alone" character instruction under *any* circumstances, the First Circuit has thus exacerbated to the extreme the tension between the circuits on this issue, and heightened to its fullest the conflict between the Supreme Court and the recalcitrant circuits which refuse to follow its directives.

Such a challenge to this Court's own cases and a resultant conflict of circuits must be resolved, one way or the other, by this Court. There should be uniformity in the federal courts on whether a defendant is entitled under any circumstances to the instruction at issue. This is one nation, with a single federal criminal justice system. Particularly in a conspiracy case where, as here, the forum for one defendant may be in any one of a number of districts none of which are his home or place of business, it is grossly unfair to allow an uncertain rule of law which will differ according to the luck of the government's choice of venue.

The right to the reputation instruction sought here is of constitutional dimension as well as one founded upon the desirability of national uniformity in the federal courts. Reputation is part of the person — indeed more a part of life even than property.

> The purest treasure mortal times afford is spotless reputation.
>
> *King Richard II*, Act I, Scene i, line 177.

. . . . . .

> Reputation, reputation, reputation! Oh! I have lost my reputation. I have lost the immortal part of myself, and what remains is bestial.
>
> *Othello*, Act II, Scene iii, line 264.*

The First Circuit candidly put the issue as a matter of luck when it said, "[un]fortunately for Goldenberg, this circuit has placed itself in the . . . camp" refusing the "standing alone" instruction (App. 51a). "Fortune" — as a goddess or otherwise — should play no more of a role in a system based on the rule of law or reason than absolutely unavoidable. As *Michelson* itself suggests, uniformity of rule is necessary in this area, as in so many others, if fairness and respect for the federal criminal process is to be a *national* goal and not dependent upon the favor of a transient circuit panel.

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* See also: Reputation is an idle and false imposition; oft got without merit, and lost without deserving.
Othello, Act II, Scene iii, line 270.

II. By Affirming the Trial Judge's Mid-Trial Instructions Permitting the Jury to Consider Highly Prejudicial Hearsay Statements, the Court of Appeals Decided an Important Question of Federal Law Which Has Not Been But Should Be Settled by This Court and Sanctioned a Significant Departure From the Usual Course of Proceedings in the First Circuit in a Manner Inconsistent with Fed. R.Evid. 801(d)(2)(E), the Sixth Amendment, and This Court's Decisions in *Glasser* v. *United States* and *Ohio* v. *Roberts*.

A. *The Factual Setting for the Disputed Ruling.**

The Petitioner, along with other defendants, consistently maintained in this case that in order to introduce co-conspirator statements under Fed.R.Evid 801(d)(2)(E) the Government must prove by a preponderance of the independent evidence that there was a conspiracy, that the defendant and declarant were participants, and that each statement was made during the course and in furtherance of the conspiracy. The Petitioner also expressly relied upon the First Circuit's decision in *United States* v. *Petrozziello*, 548 F.2d 20 (1st Cir. 1977).

Immediately before the commencement of the evidence, counsel for defendants objected to the trial court's stated intention to make the requisite preliminary findings "at the end of Ciulla's testimony." Defendants requested that the court defer any such ruling until it heard defense evidence. The court refused.

Early in the course of his testimony, Ciulla, over objections of the Petitioner, testified to numerous conversations out of the presence of the Petitioner, wherein Ciulla purportedly entered into a detailed and far-reaching agreement to fix races with

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* All quoted portions of this section of the Petition are from Volume 21 of the Trial Transcript.

the defendants Winter and John Martorano, among others. These and other such hearsay statements totaling no less than 250 conversations outside of the Petitioner's presence were admitted into evidence with a limiting instruction given virtually at the outset of the trial and constituted the sole testimony in support of the allegation in the indictment that the Petitioner was himself a Las Vegas bookmaker or was connected in any way with sports bribery.

At the conclusion of Ciulla's testimony, the court announced that it was "prepared to make preliminary findings." Counsel objected to the court's making those findings "before you hear all of the evidence" and urged that the court at least permit the defendant to have an opportunity to present defendant's evidence on the issue of whether or not he was a member of the alleged conspiracy.

The trial judge made the requisite findings and responded, "The jury can believe him or not believe him on the state of the evidence as it is now being presented and that's all I'm ruling". As the Court of Appeals recognized, the trial judge's "findings" were based, *inter alia*, upon the "801(d)(2) statements" themselves.

The trial court immediately instructed the jury, over the objections of the defendants, as follows:

> Now, prior to this time, I have limited certain evidence. . . . I'm now removing all of those limitations. You may consider all of the evidence introduced at this trial in making your determinations as to any of the defendants' participation in the offenses charged.

Evidence was thereafter presented to the court and jury both as part of the Government's case and as part of the defense, which substantially, if not dispositively, had a bearing on whether the Petitioner was a member of the alleged conspiracy.

There was testimony from Petitioner that he had never met or spoken to Ciulla until one chance introduction subsequent to the events of this case when he was introduced to him as a former Bostonian "passing through" Nevada and hard on his luck, wanting complimentary room and board. Petitioner refused this, but gave him a token handout. In fact, Petitioner later learned this event occurred when Ciulla was a fugitive from race track bribery charges, but Petitioner knew nothing of that and had never seen him before or since — until Ciulla testified at the trial and lied about his Las Vegas "connections" at the trial.

The decisions of the Court of Appeals for the First Circuit below recognized that the government's case hinged on Ciulla's testimony and that Ciulla was "a crook . . ." (App. 78a) and "a liar, a cheat, and a convicted race-fixer who handed out not only money, but also cocaine and hashish . . . ." (App. 18a) The court also stated that "Ciulla's testimony was undermined" by "striking inconsistencies in his story." (App. 18a). The Appeals Court further credited the Petitioner's own evidence of good character as set forth above, but the crucial unrestrained admission of Ciulla's lies to prove Petitioner's participation in the conspiracy was deemed harmless notwithstanding the lack of significant corroboration and volume of defendant's affirmative evidence.

B. *The Legal Error of Premature Admission of Hearsay in This Case.*

This case presents important and recurring questions concerning the admissibility of an alleged co-conspirator's statements that have resulted in a conflict among the circuits and thus gives this Court an opportunity to provide a uniform interpretation to Fed.R.Evid. 104(a) and 801(d)(2)(E).

In determining whether to approve the admission of hearsay, "The focus of the Court's concern has been to insure that there are 'indicia of reliability . . .' to 'afford the trier of fact a satisfactory basis for evaluating the truth of the prior statements. . . .'" *Ohio* v. *Roberts*, 448 U.S. 56, 100 S.Ct. 2531, 2539 (1980).

Partially in response to the need for "indicia of reliability," various circuits, including the First Circuit in *United States* v. *Petrozziello*, 548 F.2d 20 (1st Cir. 1977), have interpreted Fed.R.Evid. 104(a) and 801(d)(2)(E) as requiring the government to prove by a "preponderance of the evidence" "that the declarant and the defendant were members of a conspiracy . . ." as a predicate to the admissibility of alleged co-conspirator hearsay. Also see *United States* v. *Peacock*,* 654 F.2d 339, 349, n.1 (5th Cir. 1981); *United States* v. *McManaman*, 606 F.2d 919, 926-927 (10th Cir. 1979).

The First Circuit, however, virtually stands alone in permitting the trial judge to consider the "801(d)(2) statements" themselves in determining whether there is sufficient evidence of the defendant's participation in the alleged conspiracy. Compare the decision below and *United States* v. *Martorano*, 557 F.2d 1, 11 (1st Cir. 1977), *reh. denied*, 561 F.2d 406 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978), with *United States* v. *Ziegler*, 583 F.2d 77, 79 (2nd Cir. 1978); *United States* v. *James*, 590 F.2d 575, 581 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); and *United States* v. *Peacock*, 654 F.2d 339, 349, n.1 (5th Cir. 1981). "[T]he other circuits . . . seem to assume that the judge may only consider evidence independent of the [hearsay] statement." *Weinstein's Evidence* ¶104[05] at 104-44.

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* In *Peacock*, *supra*, at 349 n.1 the court noted that the requirement that the prosecution show "by a preponderance of the evidence *independent* of the statement itself . . . that the coconspirator and the defendant . . . were members of the conspiracy . . . is necessary to insure a minimum standard of *reliability*." (Emphasis added.)

In the instant case, the Court of Appeals recognized that the trial judge had erred in basing his ruling solely upon "Ciulla's testimony" without considering the defendant's evidence, but held that the trial court did not commit "reversible error." The First Circuit relied upon the trial judge's mid-trial conclusion that the government had met its burden based, *inter alia*, upon the "801(d)(2) statements" themselves and concluded, without foundation*, that the trial judge "would have reached the same conclusion" at the close of *all* of the evidence.

This Court should now resolve the conflict between the First Circuit and the other circuits as to whether the trial court may rely upon the hearsay statements themselves in determining whether the government has established the necessary "indicia of reliability." The conflict and confusion engendered by a lack of precise controlling precedent upon the admission of alleged co-conspiracy hearsay statements under Fed.R.Evid. 801(d)(2)(e) should be finally resolved by this Court.

The acknowledged reliance by the Court of Appeals upon the "801(d)(2) statements" in this case implicitly recognized that there were insufficient independent "indicia of reliability" to support the admissibility of the highly prejudicial hearsay statements which permeated the government's case against the defendant. Where Ciulla's testimony against the defendant had been impeached and where the defendant's testimony as to his innocence was corroborated and bolstered by his over-

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* Although the court below suggested that the trial judge "found that Ciulla's testimony was credible," the panel however ignores that the judge's "finding" came *before* the defense evidence and that the trial judge in the same conference had limited his responsibility to assess Ciulla's credibility merely to the "extent" whether he was "so inherently incredible as to not even allow the case to go to the jury." To suggest that the trial judge implicitly found Ciulla credible on *all* of the evidence because he did not find him inherently incredible on his own testimony is to compound the trial judge's error in refusing to defer his *Petrozziello* finding until after the presentation of the defense evidence.

whelming good character evidence, it could hardly be said that there was a preponderance of all of the evidence establishing the defendant's guilt. It is also submitted that under these circumstances hearsay statements and testimony by a person whom the Appeals Court accurately described as a "liar" do not constitute a sufficiently reliable basis to satisfy either the hearsay rule or the Confrontation Clause. In any event, review by this Court is now appropriate to provide guidance to the lower courts as to the minimum standard of reliability necessary in such cases. The First Circuit's reliance upon the trial judge's "permitting the conspiracy charge to go to the jury" as being equivalent to a preponderance of the evidence determination is a significant departure from the prior decisions of that court and renders meaningless the preponderance of the evidence standard necessary to insure the minimum standard of reliability.

Review by this Court is necessary to re-establish the requirements of the Sixth Amendment and the historic principle that hearsay cannot "lift itself by its own bootstraps to the level of competent evidence." *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942); *Ohio* v. *Roberts*, 448 U.S. 56, 100 S.Ct. 2531 (1980). The trial judge's reliance upon the hearsay itself, affirmed by the First Circuit, cannot be squared with either *Glasser* or the underlying principles of the "hearsay rules and the Confrontation Clause [which] are generally designed to protect similar values." *Ohio* v. *Roberts, supra*, at 100 S.Ct. 2531. The First Circuit did not even advert to *Glasser*, in its decision below, having previously ruled in *United States* v. *Martorano*, 557 F.2d 1, 12 (1st Cir. 1977) that Fed.R.Evid. 140(a) "must be taken as overruling *Glasser*" and its progeny. In view of the First Circuit's unique construction of the Federal Rules of Evidence as "overruling *Glasser*," review by this Court is now appropriate.

The First Circuit's decision below is also a significant departure from the First Circuit's own view of the procedures to be followed in determining the admissibility of alleged co-conspirator hearsay. In *United States* v. *Ciampaglia*, 628 F.2d 632, 638 (1st Cir.), *cert. denied*, 101 S.Ct. 365 (1980), the First Circuit held, "we think that in adopting the 'more likely than not,' 'preponderance' test we implicitly anticipated that the defendant's evidence would be taken into consideration. . . . It is not difficult to imagine a case in which the basic question of whether a conspiracy existed could be greatly or even dispositively affected by the defendant's evidence." Nevertheless, the First Circuit in this case affirmed the trial court's repeated refusal to consider the defendant's evidence as to his innocence. The theory of the First Circuit's decision in this case, that there was no "reversible error," would permit the affirmance of any conviction predicated upon hearsay, no matter how unreliable, if sufficient "to go to the jury," even if admitted without sufficient "indicia of reliability." By sanctioning this significant departure from its own *Ciampaglia* standard, implicit within the *United States* v. *Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977), decided before the trial of this case, and explicit in *United States* v. *James*, 576 F.2d 1121 (5th Cir. 1978), *en banc*, 590 F.2d 575, 442 U.S. 917 (1979); *United States* v. *Bell*, 573 F.2d 1040 (8th Cir. 1978); and *United States* v. *Stanchich*, 550 F.2d 1294 (2d Cir. 1977), all decided prior to the trial below and brought to the trial judge's attention, the First Circuit departed so far from the accepted and usual course of proceedings as to call for an exercise of this Court's power of supervision.

III. THE COURT OF APPEALS, WHILE RECOGNIZING AS ALWAYS ERROR A JURY INSTRUCTION FOUND UNCONSTITUTIONAL IN *Sandstrom* v. *Montana*, INCONSISTENTLY FOUND IT TO BE HARMLESS BEYOND A REASONABLE DOUBT WHEN GIVEN IN THIS CASE, THEREBY ERRONEOUSLY DECIDING AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD HAVE BEEN SETTLED BY THIS COURT.

During the trial of the case at bar, this Court decided *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), and held unconstitutional a jury instruction that a person is presumed to intend natural and probable or ordinary consequences of his acts. This Court found that such an instruction created a mandatory presumption against a defendant and shifted the burden of persuasion on the issue of intent. The District Court in this case gave the forbidden instruction, although objected to by counsel at the appropriate time before the jury retired.

In *Sandstrom*, after finding the same instruction at issue here to be constitutional error, this Court declined to rule on whether the unconstitutional instruction constituted harmless error or whether an unconstitutional jury instruction on an element of the crime can *ever* constitute harmless error. Rather, it stated that, as these issues had not been considered by the Supreme Court in Montana, it declined to reach them as an *initial* matter. As the First Circuit has now held that in this case the constitutionally forbidden instruction did not constitute harmless error, this issue is thus squarely presented for the Court.

While not deciding the "harmless" question in *Sandstrom*, this Court did give a strong indication that the instruction at issue would necessarily constitute reversible, or harmful, error:

> The standard reference work for federal instructions, E. Devitt and C. Blackmar, Federal Jury Practice and

> Instructions (3d ed. 1977), describes the instruction as 'clearly erroneous,' 1 id. at 405, and as constituting 'reversible error,' 1 id. at 448. 99 S.Ct. at 2454, fn. 3.

Therefore, resolution of this important question of federal law, which has not been but should be settled by this Court, should not be left in its present state, particularly as the *Winter* opinion is so painfully strained and internally contradictory on this point.

First, the Court of Appeals stated (App. 43a),

> Therefore, in light of *Sandstrom*, we believe it is always error to instruct the jury that a person is presumed to intend the natural and probable or ordinary consequences of his acts, and we hold that this sort of instruction should not be used.

But then it stated, "[n]evertheless, in this case we find the error was harmless beyond a reasonable doubt, because it did not contribute to the defendants' convictions." *Ibid.* The Court attempted to support this conclusion, after stating "[t]he challenged instruction, however, makes no sense in the context of this trial," by engaging in an intricate post-case legal analysis. However, the analysis of an appellate court should not be substituted for a determination by the jury. As this Court has stated:

> From presuming too often all errors to be "prejudicial," the judicial pendulum need not swing to presuming all errors to be "harmless" if only the appellate court is left without doubt that one who claims its corrective process is, after all, guilty. In view of the place of importance

> that trial by jury has in our Bill of Rights . . . the belief of appellate judges in the guilt of an accused, however justifiably engendered by the dead record, [should not be substituted] for ascertainment of guilt by a jury under appropriate judicial guidance, however cumbersome that process may be. *Bollenbach* v. *United States*, 326 U.S. 607, 615 (1946).

Furthermore, just as in *Sandstrom*, a reasonable juror, not schooled in intricate legal analyses, might very well have been influenced by the very giving of this instruction. If the challenged instruction made no sense in the context of the trial, why was it given? As the same court stated in *United States* v. *Harrigan*, 586 F.2d 860, 863 (1st Cir. 1978):

> The district court was convinced at the time of the correctness of its statement. Like the rest of the charge, the offending instruction was given in clear and precise language. There was no reason for an attentive juror, mindful of his duty to take the law from the court, to ignore or disregard this instruction.

As this Court stated in *Brotherhood of Carpenters* v. *United States*, 330 U.S. 395, 408-409 (1947), "A failure to charge correctly is not harmless, since the verdict might have resulted from the incorrect instruction."

Therefore, this Court should grant certiorari and settle the important question of federal law left unresolved in *Sandstrom* — whether that instruction can *ever* be harmless error.

IV. THE COURT OF APPEALS MISAPPLIED THE STANDARDS OF *United States* v. *Agurs* BY IGNORING THE GOVERNMENT'S CONCESSION AND THE DISTRICT COURT'S FINDING THAT THE PETITIONER HAD MADE A SPECIFIC REQUEST FOR CERTAIN EXCULPATORY MATERIAL AND HENCE DECIDED THE APPEAL ON FACTS OUTSIDE THE RECORD — A SERIOUS DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

The Petitioner filed before trial a motion for particular exculpatory materials in which the Petitioner specifically requested such material as related to the master-fixer Ciulla's interviews with the FBI and testimony before a Federal Grand Jury in "Detroit, Michigan." The Magistrate and Court effectively granted that portion of the motion. The Government did not disclose any such material to counsel for the Petitioner before trial and during trial offered only Grand Jury Minutes to the Court *in camera*, producing no FBI interviews (so-called 302s).

Only after trial did the Petitioner learn of the existence and contents of prior interviews of Ciulla about Las Vegas connections which had been disclosed in Detroit prosecutions using Ciulla as a witness after the Boston trial. Petitioner then learned for the first time that Ciulla had, in interviews with the FBI in 1976, 1977, and 1978, acknowledged familiarity with Las Vegas, Nevada which *predated* any claimed meetings with Petitioner and use of him for "connections" to "get down" bets.

The Court of Appeals (in disagreement with the District Court Memorandum, App. 91a) correctly described the so-called Detroit Information as "exculpatory material within the scope of *Agurs*," but said it "did not think that there was a specific pretrial request for the material." (App. 73a.)

The Court of Appeals "thought" wrongly in that regard and — more important for review here — its "thoughts" were con-

trary to the District Court's finding (A. 91a) and the Government's specific concession before the District Court that "In this case defendants did make a specific request for the [Detroit] information." (Joint New New Motion Appendix, p. 268). The Court of Appeals' "thoughts" were therefore outside the record in this case. See *United States* v. *Johnson*, 327 U.S. 106 (1946) and *Campbell* v. *United States*, 373 U.S. 487 (1963).

The concession by the United States was hardly gratuitous. Even now the Petitioner cannot imagine how his requests could have been more specific. Taken together, the defense requests specified: (a) subject matter — criminal conduct of Ciulla known to the Government involving betting on fixed horse races through other persons in Las Vegas at the time of the alleged offenses; (b) type and source of document — statements of Ciulla, reports of statements of Ciulla to the FBI in, among other places, *Detroit*, contained in FBI 302s.

The analysis of the Court of Appeals also completely ignored the specific repeated demands for Ciulla's "Detroit [grand jury] testimony." Repeated mid-trial requests for the "exculpatory" information in the Detroit grand jury testimony of Ciulla were also denied as a result of the Government's heated objections to the disclosure thereof.

This case presents the Court with the following issue: When a Court of Appeals misreads the record containing a District Court finding and a government's concession as to the state of that record, and then applies a wrong legal standard to the misread record, is not the proceeding a serious departure from the usual course? Parties should, in the usual course, be able to rely on a court's using conceded or undisputed facts *without modifying them*. A Court of Appeals is *not* a finder of new facts and should not be a changer of facts conceded by the parties. Yet, here the Court of Appeals ignored the concession that a particular request for the Detroit information had been

made pre-trial (inexplicably calling the requests "boiler plate" for "any and all" exculpatory evidence) and proceeded to apply the wrong *Agurs* standard, the one for general rather than specific requests.

The difference between the two *Agurs* standards is enormous in this case. The standards used by the Court of Appeals, based upon its error of misreading the Government's concession as to that record, was to "evaluate the Detroit material in the context of the entire record to determine if the omitted material creates a reasonable doubt that did not otherwise exist" (App. 74a). The correct *Agurs* standard to be applied to the specific request in this case is whether the suppressed statements "might have affected" the jury in determining whom to beleive, Ciulla or the Petitioner.* The exculpatory evidence ofnprior Ciulla Las Vegas activities unrelated to Petitioner was surely material and useful for impeachment of Ciulla's story that he needed Petitioner's connections there. Petitioner is not required to show more than that under *Agurs*, if only the correct standard were applied, because of the conceded *specific* pretrial request for the material.

The trial judge stated on more than one occasion in the trial of this case that it was a single "important witness" case as related to Petitioner at least. See *Giglio* v. *United States*, 405 U.S. 150 (1972). The Government acknowledged in its Brief to the Circuit that "evidence of Goldenberg's . . . participation in the conspiracy was no. overwhelming" (Government's Brief, p. 66). And the trial judge commented during trial and

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* Perversely, in this case of error within error, the District Court *did* say it used this standard (App. 91a). The Court of Appeals, however, wrongly used the stricter "reasonable doubt" standard because of its error in finding no specific request. The District Court erred in finding the material not exculpatory (App. 91a). The Court of Appeals corrected the District Court on this point, but to no avail because of its own misperception of the specific nature of the request and resulting use of the wrong *Agurs* standard.

after trial on the weakness of the Las Vegas aspect of the case ("Frankly, I don't think there is a lot of evidence against certain people here, specifically Price and Goldenberg", the "corroboration was not the strongest" (App. 97a). This case presents itself in all aspects, therefore, as one where "the question of guilt or innocence is a close one." *Chapman* v. *California*, 386 U.S. 18, 22 (1967).

At the very least, the District Court should have been ordered by the Court of Appeals to conduct an evidentiary hearing on the suppressed material and then a new trial. That relief alone will afford a fair and open encounter between the credibility of a petitioner of excellent reputation and that of the master-fixer Ciulla.

Conclusion.

For the reasons stated, the petition for a writ of certiorari to the United States Court of Appeals for the First Circuit should be granted.

Respectfully submitted,

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Appendix

APPENDIX I-A

United States Court of Appeals
For the First Circuit

No. 79-1437

UNITED STATES OF AMERICA,

APPELLEE,

v.

HOWARD T. WINTER,

DEFENDANT-APPELLANT.

No. 79-1438

UNITED STATES OF AMERICA,

APPELLEE,

v.

MELVIN GOLDENBERG,

DEFENDANT-APPELLANT.

No. 79-1441

UNITED STATES OF AMERICA,

APPELLEE,

v.

ELLIOT PAUL PRICE,

DEFENDANT-APPELLANT.

No. 79-1442

UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES DeMETRI,

DEFENDANT-APPELLANT.

No. 79-1446

UNITED STATES OF AMERICA,

APPELLEE,

v.

CHARLES DeMETRI,

DEFENDANT-APPELLANT.

79-1476

UNITED STATES OF AMERICA,

APPELLEE,

v.

JAMES MARTORANO,

DEFENDANT-APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

[HON. A. DAVID MAZZONE, *U.S. District Judge*]

Before

ALDRICH, CAMPBELL and BOWNES, *Circuit Judges.*

Albert F. Cullen, Jr., with whom *Cullen & Wall* was on brief, for appellant in Case Number 79-1437.

Morris M. Goldings, with whom *Hawkes & Goldings* was on brief, for appellant in Case Number 79-1438.

Jeffrey M. Smith, with whom *Paul T. Smith*, and *Harvey R. Peters* were on brief, for appellant in Case Number 79-1441.

Jeanne Baker, with whom *Barry M. Haight*, and *Joseph T. Travaline* were on brief, for appellants in Case Numbers 79-1442 and 79-1446.

Richard M. Egbert, by appointment of the Court, with whom *Marcus & Egbert* was on brief, for appellant in Case Number 79-1476.

Kathleen A. Felton, Attorney, Department of Justice, with whom *Edward F. Harrington*, United States Attorney, and *Jeremiah T. O'Sullivan*, Special Attorney, Department of Justice, were on brief, for appellee.

October 30, 1981

BOWNES, *Circuit Judge.* The case reaches us through two separate appeals: in the first, defendants Howard T. Winter, James Martorano, James DeMetri, Charles DeMetri, Elliot

Paul Price, and Melvin Goldenberg appeal their convictions following a 46-day trial on grounds that will be outlined below; in the second, all six defendants appeal both the district court's denial of their motion for a new trial and its denial of an evidentiary hearing on that motion. Because of the nature of the case, it is necessary to describe the indictment and recount the evidence presented at trial in some detail.

THE INDICTMENT

At the time it reached the jury, the indictment consisted of 42 counts. Count One charged that the appellants, as well as several others,[1] were employed by and associated with an enterprise, as defined by 18 U.S.C. § 1961(4)[2] of the Racketeer Influenced and Corrupt Organizations Act (RICO), which was engaged in and the activities of which affected interstate commerce. This enterprise was alleged to have been composed of individuals associated in fact to fix by bribery horse races at various race tracks[3] and to profit from this activity by wagering on those races. The count further alleged that, from on or about December 1973 to on or about

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[1] Count One named twenty defendants, of whom only nine were tried in this action. Besides the six appellants, one defendant, Norman Mercier, was acquitted, one defendant, Robert Owen, pleaded guilty during trial, and one defendant, Sidney Tildsley, was convicted, but is not involved in this appeal.

[2] This section provides:

> As used in this chapter—
>
> (4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity[.]

[3] The indictment identified the race tracks involved as Suffolk Downs Race Track, East Boston, Massachusetts; Rockingham Race Track, Salem, New Hampshire; Lincoln Downs Race Track, Lincoln, Rhode Island; Pocono Downs Race Track, Plains Township, Pennsylvania; Atlantic City Race Track, Hamilton Township, New Jersey; and Garden State Park, Cherry Hill, New Jersey.

November 1975, these individuals conspired with each other and with the Government's star witness, unindicted coconspirator Anthony Ciulla, to violate 18 U.S.C. § 1962(c)[4] of RICO by conducting the affairs of the enterprise "through a pattern of racketeering activity."

As specifically outlined in the count, the alleged scheme involved betting on fixed races at East Coast tracks and also placing bets on the fixed races through illegal off-track bookmakers throughout the country. Several defendants, including Winter and Martorano, were alleged to have financed Ciulla and others to fix races by bribing jockeys, trainers, owners, and racing officials to prevent specific horses from finishing in the top three positions in their respective races. Certain members of the enterprise, including Winter, were alleged to have utilized force and violence to ensure that bribed jockeys and trainers actually performed as promised. Winter and Martorano, among others, were named as having caused Ciulla to travel from Massachusetts to Nevada to meet with bookmakers, including Price and Goldenberg, to arrange the terms on which the outside wagering on fixed races would be handled, and to collect the resulting profits.

To effectuate the scheme, several individuals would purchase large quantities of perfecta, exacta, trifecta, or quinella tickets[5] on the fixed races. Others, including Winter, would make telephone calls in interstate commerce and discuss wagering information on those races. Winter, Martorano,

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[4] This section provides:

> It shall be unlawfull for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

[5] Ciulla testified that these are forms of "exotic" wagering in which the bettor buys a ticket specifying the order of finish of certain horses. For example, in order to win on a trifecta ticket, the bettor would have to predict the top three horses and their exact order of finish.

Ciulla, and others drew up lists of New England independent bookmakers whom the group would cheat by betting with them on races the group had fixed, and the Las Vegas members of the enterprise, including Price and Goldenberg, would cheat Las Vegas independent bookmakers in the same way. The winnings from wagering both inside and outside the track were brought to Motorama Sales, Inc., in Somerville, Massachusetts, and divided among the group. Motorama Sales, which was owned and controlled by Winter and Martorano, was used as a meeting place for the members of the enterprise.

Finally, it was alleged that certain individuals, including Winter, Martorano, James DeMetri, Charles DeMetri, and Ciulla purchased a race horse, Spread The Word, for approximately $30,000, with the purpose of having the jockey hold it back so that it would finish poorly in several races; when the odds were high enough, it was to be entered in a race with inferior horses and allowed to win.

Count One also contained 45 overt acts, all said to have been committed to effect the objects and purposes, and to be in furtherance of the conspiracy in violation of 18 U.S.C §§ 1962(d)[6] and 1963(a).[7] The Government further developed its theory of the enterprise's operations through these overt acts. The mechanics of 16 fixed races were set out in detail. Included in this were descriptions of three separate incidents of violence, in which certain members of the enterprise beat

[6] Under 18 U.S.C. § 1962(d) it is "unlawful for any person to conspire to violate any provisions of subsection (a), (b), or (c) of this section."

[7] Section 1963(a) provides:

> Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

up a trainer and two jockeys as part of the scheme. Also described were trips taken by Ciulla to Las Vegas to make plans with and to pick up large winnings from Nevada bookmakers, including Price and Goldenberg. James Martorano was identified as the person responsible for investing the enterprise's profits in legitimate businesses. An attempt by Ciulla, Winter, and Martorano to invest some of the enterprise's profits through the purchase of the Squire Lounge, a topless, go-go establishment in Revere, Massachusetts, was outlined.

In its final form, Count Two, which incorporated Count One by reference, charged Winter and Martorano with conducting the enterprise's affairs through a pattern of racketeering activity as defined in 18 U.S.C. §§ 1961(1)(B)[8] and 1961(5).[9] This pattern included racketeering acts as

[8] Section 1961(1)(B) of 18 U.S.C. provides:

As used in this chapter—

(1) "Racketeering activity" means . . .

(B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transaction of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of state or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic). . . .

[9] Under this section:

charged in Counts Three through Forty-Two and Violations of 18 U.S.C. §§ 224,[10] 1952,[11] and 2.[12] These activities were

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(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity[.]

[10] This section provides:

(a) Whoever carries into effect, attempts to carry into effect, or conspires with any other person to carry into effect any scheme in commerce to influence, in any way, by bribery any sporting contest, with knowledge that the purpose of such scheme is to influence by bribery that contest, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both.

(b) This section shall not be construed as indicating an intent on the part of Congress to occupy the field in which this section operates to the exclusion of a law of any State, territory, Commonwealth, or possession of the United States, and no law of any State, territory, Commonwealth, or possession of the United States, which would be valid in the absence of the section shall be declared invalid, and no local authorities shall be deprived of any jurisdiction over any offense over which they would have jurisdiction in the absence of this section.

(c) As used in this section—

(1) The term "scheme in commerce" means any scheme effectuated in whole or in part through the use in interstate or foreign commerce of any facility for transportation or communication;

(2) The term "sporting contest" means any contest in any sport, between individual contestants or teams of contestants (without regard to the amateur or professional status of the contestants therein), the occurrence of which is publicly announced before its occurrence;

(3) The term "person" means any individual and any partnership, corporation, association, or other entity.

[11] Under 18 U.S.C. § 1952:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to —

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

said to be violations of 18 U.S.C. §§ 1962(c) and 1963(a). The Government withdrew the forfeiture provisions of this count on the final day of trial.

Counts Three through Forty-Two charged specific violations of 18 U.S.C. § 224 (Sports Bribery Act) and 18 U.S.C. § 1952 (Travel Act) and two violations resulting from the operation of the scheme. Most of the counts were based on incidents described as overt acts in Count One. Winter and Martorano were named in 38 of the counts, Price and Goldenberg in 15, and the DeMetris in only 2.

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(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics or controlled substances (as defined in section 102(6) of the Controlled Substances Act), or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C. § 1952 (1970 & Supp. 1981).

[12] This section provides:

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

The jury convicted each appellant on every count in which he was named.

THE EVIDENCE

Our review of the evidence, together with all legitimate inferences to be drawn from it, must be made in the light most favorable to the party prevailing below, the Government. *E.g., United States* v. *Tedesco*, 635 F.2d 902, 906 (1st Cir. 1980); *United States* v. *Izzi*, 613 F.2d 1205, 1206 (1st Cir.), *cert. denied*, 446 U.S. 940 (1980). Credibility choices must be resolved in favor of the verdict. *United States* v. *Gonzalez*, 617 F.2d 104, 106 (5th Cir.), *cert. denied*, 101 S. Ct. 202 (1980); *United States* v. *Beecroft*, 608 F.2d 753, 756 (9th Cir. 1979). One of the few subjects on which the appellants and the Government agree is that the testimony of Anthony Ciulla was absolutely vital to the case. Testifying under an informal grant of immunity, Ciulla described in detail a scheme that — not surprisingly — neatly dovetailed with the indictment.

Formation of the Enterprise.

According to Ciulla, he first met with Winter in connection with this plan at a bar called the Back Room in Somerville in late 1973. There Ciulla agreed that he and his partner Barnoski, a fugitive at the time of the trial, would deal directly with jockeys and trainers in fixing horse races. Winter in turn agreed that he and his partners would finance the scheme, place outside bets with illegal bookmakers and collect money from them, and supply runners. Ciulla was to receive 50% of the profits, to be split with Barnoski, but be responsible for all losses. Winter was to split his half with his partners, whom he said included James Martorano.

Within a month, the group met again, this time at Marshall Motors[13] in Somerville. Winter and Martorano were among those present. Ciulla testified that, during a discussion about the roles that the various participants in the scheme would play, Winter and Martorano mentioned Price and Goldenberg[14] as "significant bookmakers" who could be instrumental in moving money to illegal bookmakers.

Ciulla testified that within the next two months, he traveled on Winter's instructions to Las Vegas, Nevada, to meet Price and Goldenberg to learn the tracks on whose races the most money could be bet outside with illegal bookmakers. He described two meetings with Price at the Riviera Hotel and two meeting with Goldenberg at the Tropicana Hotel. Both men promised to obtain the information that Ciulla needed. Ciulla reported back to Winter and Martorano at Marshall Motors that Price and Goldenberg would inform him of the amounts of money that could be "moved"[15] with illegal bookmakers in Las Vegas. He testified that he called Price at the Riviera and Goldenberg at the Tropicana within a week of his return from Las Vegas and learned the names of the tracks where the group would be able to move the most money.

In April or May of 1974, Ciulla met Charles and James DeMetri and their brother Peter, now deceased, for the first time. This meeting occurred at the DeMetris' truck refrigeration business, Boston Thermo-King; Winter and Barnoski

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[13] Marshall Motors was also known as Motorama; Ciulla used both names in his testimony.

[14] Goldenberg has used the name Golden both socially and for employment purposes for many years. Ciulla testified that at one time Golden was the only name by which he had known Goldenberg. Later, however, he testified that he had always known that Goldenberg's name was Goldenberg, and that he had had Goldenberg paged under that name at the Tropicana. Ciulla generally referred to Goldenberg as Golden during the trial.

[15] Ciulla testified that "moving money" concerned "betting amounts of money with illegal bookmakers on a specific race on a particular day."

were also present. Charles, James, and Peter DeMetri all agreed to participate in a race fixing scheme and to put in their names the horses that the group planned to buy. The DeMetri brothers were also in the racing business at that time and owned race horses.

At a subsequent gathering in June of that year, Ciulla, in Winter's presence, told all three DeMetris that the group planned to buy a race horse for approximately $30,000. The DeMetris would own one-half interest in the horse, and the rest of the group, including Ciulla, Winter, and Barnoski, would own the other half. Ciulla explained that he intended to reduce the apparent value of the horse by several thousand dollars in order to deceive the public into not betting on it. This would be done by holding the horse in several races. The vastly underrated horse would then be allowed to win a race unexpectedly and produce large winnings for those few who bet on it — this group to include, of course, the participants in this scheme. Winter assured James, Charles, and Peter that they would be informed of the other races that Ciulla was fixing. Ciulla assured them that he would call them so that they could bet with outside illegal bookmakers, but that Winter and his associates would be entitled to half of their winnings.

As a result of these meetings, the DeMetris supplied $15,000 of the $26,000 needed to purchase the horse Spread The Word in mid-June 1974. Louise Hicks, the DeMetris' sister, was listed as the owner on the bill of sale, and the horse was transported to the DeMetris' farm in North Reading, Massachusetts.

The Races.

The indictment charged that the enterprise fixed twenty separate thoroughbred horse races: at Pocono Downs on August 12, 18, and 20, and September 8, 1974; at Lincoln Downs on August 1 and December 9, 1974, and on March 20, 1975; at Rockingham Park on August 6, 1975; at Suffolk Downs on October 16, and November 6 and 15, 1974; at Garden State Park on January 11, February 4, 8, and 13, and

May 22 and 23, 1975; and at Atlantic City Race Track on July 4, 12, and 17, 1975. Because the method Ciulla used to fix races changed very little from race to race, we will describe in detail only one such incident: the third race at Suffolk Downs on November 6, 1974, as charged in Count Twenty-One.

Ciulla testified that, on the evening of November 5, he spoke by telephone with both Barnoski and Guy Contrada. Contrada told Ciulla that he believed that the next day's third race could be fixed. At Ciulla's request, Contrada identified five jockeys scheduled to ride in the race who had been receptive to bribes in the past. As was generally the case, Ciulla was unable to recall the names of any jockeys involved in this transaction without referring to the pertinent race chart.

The next morning, Ciulla, accompanied by Richard Donati, met Contrada and Tommy Pizzi at Buddy's Cafe in Revere, Massachusetts. Pizzi was scheduled to ride the favorite in the race. He felt that it would be difficult to hold the horse, but agreed to do so for $1,500 to $2,000. Ciulla gave Contrada money to bribe the other four jockeys he had identified, for amounts ranging from approximately $500 to $1,000.

Contrada returned to the cafe from the track after paying off the four riders. Ciulla then traveled to Marshall Motors for a meeting that included Winter and possibly Martorano. He told the group to ready the bookmakers. Meanwhile, he studied the racing form and wrote out betting slips on which were noted the numbers of the horses that were not to be held. He then met the runners at or just outside the Marshall Motors garage and gave them their instructions: to purchase tickets on the horses indicated as close as possible to post time, to cash the tickets after the race, and to return with the winnings to the Winter Hill area.[16] Ciulla also informed Winter and Martorano of his choice of Raven's Nova as the outside bet[17] and told them not to bet with the outside bookmakers any earlier than necessary.

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[16] This is the name that Ciulla used to describe the area in Somerville in which Marshall Motors was located.

[17] Ciulla explained that most bookmakers would not accept bets on "exotic" races such as trifectas and perfectas. Therefore, he would choose one specific horse on which the group would place its outside bets.

After the race, Ciulla met the runners, collected approximately $30,000 from them, and paid each a few hundred dollars for his services. At a later conversation with Winter and others, he learned that the total winnings inside and outside the track for this race totaled about $140,000.

The Second Trip to Las Vegas.

In late November 1974 Ciulla again traveled to Las Vegas where he met Price, Goldenberg, and Douglas Morello.[18] He saw Price twice, on both occasions at the Riviera Hotel. At the first meeting, Ciulla informed Price that he was preparing to fix races at Garden State and that he wanted to know how receptive illegal bookmakers would be to accepting bets on those races. Price felt that Garden State would be a "very good" track for outside betting. Their second meeting took place the next day; Price said it would take him several days to obtain specific information on Garden State betting. Ciulla also met with Goldenberg at the Tropicana's coffee shop on his first day in Las Vegas to discuss betting on races at the New Jersey track. Goldenberg agreed this would be "very beneficial" and asked Ciulla to contact him later for specific information.

Ciulla testified that he telephoned Price at the Riviera during the first two weeks of December from the Rhode Island home of Robert Owen, a codefendant who pleaded guilty during the trial. From an identification exhibit offered by the Government, a toll call record, he specified the date of the call

[18] Douglas Morello was charged in the original superseding indictment, but the trial judge dismissed the case against him, and he did not testify at the trial. Throughout the trial, Ciulla referred to Morello as "Morelli"; we have adopted the spelling found in the indictment.

as December 4. During this call Price reported that he had made substantial progress with the illegal bookmakers.[19]

The Career of Spread The Word.

Although Ciulla's testimony on the scheme involving Spread The Word trickled out through six days of direct testimony, we recite only the highlights. In July 1974 arrangements were made for stabling and training Spread The Word at the DeMetris' farm in North Reading, Massachusetts. It ran its first race at Rockingham Park in New Hampshire and, although the favorite, lost by about 20 lengths. Its jockey, Contrada, had a difficult time holding the horse and the stewards questioned him about its finish. After that, Spread The Word was run at a gallop for a mile or two before a race so as to exhaust it. In the two other races Spread The Word was entered at Rockingham, it finished last.

Spread The Word was then entered in a claiming race at Penn. National race track in December of 1974. The necessary steps were taken to see to it that the horse would not be claimed; it finished fourth. Spread The Word was now eligible to run in starter handicap races and could no longer be claimed.

Arrangements were made to have Spread the Word race at Garden State race track in New Jersey in January of 1975. It was entered in two races, held back in both and finished either last or next to last in each.

The groundwork had now been laid and Spread The Word was put in a race to win on February 8, 1975, the ninth race at Garden State. Three jockeys were bribed to hold their mounts, just in case Spread The Word's ability was not sufficient. The horse won as planned. The track winnings came

[19] In February 1975 Ciulla questioned Morello about the credibility of the illegal bookmakers, asking him if "they would still be receptive if several of ... [the] horses won." Morello responded that "bookmakers out here [Las Vegas] don't believe horses can win."

to between $80,000 and $90,000 and about $400,000 were won on outside bets.

Plans were made to run Spread The Word in the third race at Garden State on February 22 but hold it back so it would not win. By this time, however, the racing stewards had become suspicious and scratched the horse when they were informed that it belonged to Winter, Ciulla and "the rest of the group from the Boston area." Thus ended Spread The Word's racing career.

The Final Trip to Las Vegas.

Ciulla testified that sometime between February 14 and February 22, 1975, he traveled from Boston to Las Vegas and met Price and Goldenberg. As was his custom, Ciulla met Price at a restaurant at the Riviera. Price told Ciulla that Winter had told him to expect Ciulla's arrival. Although he still had several illegal bookmakers to call, he handed Ciulla approximately $100,000 in $100 bills, wrapped in several packages and placed in a brown bag. He also informed Ciulla that Winter had arranged credit for him at the Riviera so that he could gamble there.

Ciulla met Goldenberg the next morning in the Tropicana's coffee shop. Goldenberg handed Ciulla several white envelopes containing about $100,000 in $100 bills and told Ciulla that he had not been able to collect all the money due, but that runners were to pick up later whatever he was not able to collect during Ciulla's stay.

Price and Ciulla met again that evening in a bar at the Riviera. Price had not been able to collect any more money from the bookmakers he had contacted, but Winter had arranged for runners to bring the balance to Boston.

Goldenberg and Ciulla met a second time the following evening at a restaurant in the Tropicana. Goldenberg mentioned that betting on the past few horses had helped him — apparently financially — because he was a "degenerate

gambler" and had "blown" a lot of money. Before his departure, Ciulla also picked up $40,000 to $50,000 from Morello.

On his return, Ciulla met Winter, Martorano, Barnoski, and others at Marshall Motors. At this point in his testimony, Ciulla specified the date of this meeting as February 18 or 19, 1975. While at Marshall Motors, the approximately $250,000 that Ciulla had picked up in Las Vegas was distributed. Ciulla and Barnoski took one-half of the cash; Winter took the other half and divided it into sevenths. James Martorano took his share on the spot.

Corroborating Ciulla.

The remainder of the Government's case was aimed primarily at bolstering Ciulla's story. We briefly review the testimony of some of the more important witnesses called for this purpose.

The Government called as a witness a woman who had been employed as a secretary by Peter, Charles, and James DeMetri in 1973 and 1974. She testified that several meetings, attended by the three DeMetri brothers, Ciulla, and Winter, among others, were held at Boston Thermo-King during that period. She also mentioned that she overheard one conversation in which the group was discussing horses and that, when she left Thermo-King in August 1974, the DeMetris were in the process of building a track.

Vincent Mara was called to recount Owen's attempt to bribe him in order to prevent Spread The Word from being claimed.[20] Mara stated that just as Owen arrived, he spotted a man he later learned was Ciulla driving by. The Government also presented the testimony of several jockeys whom Ciulla had paid off. Each described in detail the cir-

[20] In August 1974 Ciulla, through Owen, had approached Vincent Mara, the racing secretary at Pocono Downs. Owen was to tell Mara that Ciulla wanted a race with a $3,000 to $3,500 claiming prize added to the racing program; Spread The Word was to be entered in it. Mara was to guarantee either that no claim would be

cumstances of several fixed races at various tracks; in each case Ciulla or an intermediary offered the jockey several hundred dollars to hold the horse he was riding out of the first three finishing positions. One rider testified that Ciulla paid him a bit more for one race so that he would not only hold his horse, but also serve as an "insurance rider" — one who watches the other bribed jockeys and prevents them from winning. Another testified that he had initially refused to hold the horses he was riding, but eventually relented when other jockeys began to box him in during races causing the horse he was riding to finish poorly. Many of the races discussed by these jockeys were not part of the indictment at all.

An officer of the Pennsylvania state police testified that he observed Ciulla, Owen, Barnoski, and several others at Pocono Downs races in August 1974. On one of these dates, he observed one of Ciulla's associates spend 16 of the 20 minutes the betting windows were open buying $3.00 tickets; when he finished, he had a stack of tickets "about the size of a loaf of bread."

Another witness, who served as one of Ciulla's intermediaries, testified that Ciulla arranged for him to stable his race horse at the DeMetris' farm when it was scheduled to run at Rockingham Race Track in August 1975. In fact, the witness, as well as his horse, was a guest of James DeMetri at Ciulla's behest. The witness testified that James DeMetri picked him up at the airport and that they stopped for a drink on the way to North Reading; Ciulla and Barnoski both came into the bar later. When the witness returned to his home in

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made on the horse, or that he would notify the group if a claim was made. If a claim was entered, the enterprise wanted the choice of either not sending Spread The Word to the post, or having the rider jump off the horse in the post parade. Owen was to agree to any reasonable figure that Mara requested as payment.

Owen's meeting with Mara lasted a mere 10-15 minutes. Owen reported to Ciulla that Mara had made it clear that he would have nothing to do with the scheme; he feard that Mara would call in law enforcement officials, so Spread The Word never made the trip to Pocono Downs.

New Jersey after the race, he left his horse at the DeMetri farm for an unspecified length of time, and James DeMetri refused to charge him for keeping the horse.

The Government also put into evidence neatly organized charts, listing toll calls that were made the day before, after, and of any race named in the indictment, and showing that they originated from several key locations, including the Rickshaw Inn, the Country Squire Motel, James Martorano doing business as Motorama Auto, and Barnoski's, Owen's,[21] and Ciulla's homes. These charts included calls made to Thermo-King, the Tropicana (but not the Riviera), Ciulla's home, and to Charles DeMetri.

The Defense.

The Government established by direct examination, and the defense confirmed by cross-examination, that Ciulla was a liar, a cheat, and a convicted race-fixer who handed out not only money, but also cocaine and hashish, as bribes. The defense, however, consisted of more than outright denials by some of the defendants and wholesale character impeachment of the Government's principal witness by all of them. During cross-examination, Ciulla was forced to admit that his story on direct was filled with a very large number of minor inaccuracies. Several of the defendants also introduced, or discovered through cross-examination of Ciulla, evidence that directly contradicted his testimony. To indicate the extent to which Ciulla's testimony was undermined on some subjects, we mention some of the more striking inconsistencies in his story.

Howard Winter's attorney called a witness who produced a registration card from a Florida club showing that a Howard Winter had been a guest at the club from February 17 through February 25, 1975. Winter's account and daily sum-

[21] Owen's phone was listed under his given name, Ronald Ethier. It appears that Owen changed his name legally several years ago.

mary sheets reflected charges throughout the period. The witness also produced a charge folio and daily summary sheets for a James Martorano that indicated that he also had visited the club over the same period of time. She viewed a home movie of Winter and Martorano allegedly taken at the resort and testified that the club appeared in February 1975 as it did in the film, although it had since undergone substantial renovation. This evidence contradicted not only Ciulla's testimony that he telephoned Winter at very specific locations in the Boston area over the two-day period surrounding the aborted Spread The Word race of February 22, 1975, but also his testimony that the money he picked up in Las Vegas was split among Winter, Martorano, and others on February 18 or 19 at Marshall Motors.

Counsel for Charles DeMetri called as a witness the owner of a travel agency, who testified that he had booked Charles DeMetri on a tour, beginning with a meeting in Boca Raton, Florida, on February 19, 1975, and concluding with a cruise on the S.S. Statendam from February 21 to March 3, 1975. Another witness, who had actually been on the tour, produced Charles DeMetri's stateroom assignment on the ship, as well as a photograph of Charles and his wife taken on board. The witness also presented a photograph taken of Charles and James DeMetri together in Boca Raton on the evening of February 20.

James DeMetri's attorney produced as a witness a business associate of both DeMetris who testified that he had flown to Florida with them on February 18 and remained with James DeMetri[22] until February 20. On the morning of February 21, he and James returned to Boston.

The testimony of these witnesses directly conflicted with Ciulla's claim that he had called Charles DeMetri at his home on February 21 and 22, and James DeMetri at his home on February 22, to discuss his strategy on Spread The Word's scheduled race of February 22.

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[22] The witness testified that Charles DeMetri left at some point during this period to meet his wife and travel to Fort Lauderdale.

As discussed above, Ciulla also testified that soon after his return from his second meeting in Las Vegas, he called Price at the Riviera from Robert Owen's home in Rhode Island. From a Government exhibit, he identified the date of the call as December 4. Price's attorney produced Riviera Hotel records, including restaurant receipts signed by Ciulla and phone charges, that placed Ciulla at the Riviera itself as late as December 5.

Despite the apparent holes in his testimony, however, the jury chose to believe Anthony Ciulla. This was their prerogative, and the case was properly submitted to them.

CIULLA'S IMMUNIZED TESTIMONY

Because Ciulla's testimony was so vital to the Government's case, we first address the appellants' claims stemming from the Government's grant of immunity to him. Ciulla testified on direct examination by the prosecutor that he had entered into an agreement with the Government, through the Special Attorney prosecuting the case, guaranteeing that in exchange for his "full and complete and truthfull testimony, ... no further charges would be brought" against him, that arrangements would be made for one state sentence to run concurrently with another state sentence, that he and his family would be relocated, and that he "would be subsidized by the federal government ... until termination from the program." (the federal witness protection program).

Appellants' first contention, that this agreement impermissibly circumvented the requirements of the federal immunity statute, 18 U.S.C. §§ 6001-6005, paticularly § 6002, is quickly dispatched. Appellants point to no language in the statute, perhaps because there is none, requiring that federal prosecutors follow its procedures. The Government's failure to use the statutory mechanism does not render its agreement with Ciulla unlawful. *United States* v. *Librach*, 536 F.2d

1228, 1230 (8th Cir.), *cert. denied*, 429 U.S. 939 (1976); *accord*, *United States* v. *Weiss*, 599 F.2d 730, 735 n.9 (5th Cir. 1979); *see Galanis* v. *Pallanck*, 568 F.2d 234, 235-36 & n.1 (2d Cir. 1977). "The decision of whether to prosecute rests in the Executive Branch." *United States* v. *Librach*, 536 F.2d at 1230.

Nor do we find the fact that the agreement was not reduced to a writing signed by Ciulla fatal to its use here especially since Ciulla and the prosecutor apparently agreed completely on the terms of their deal. Because the Government revealed the contents of its arrangements with Ciulla before trial, and Ciulla reiterated its scope at trial, we do not see how appellants' rights to either confrontation or due process were infringed. Finally, we disagree that the absence of a written agreement invited Ciulla to believe that the agreement was contingent on his performance to the Government's satisfaction. The case of *Boone* v. *Paderick*, 541 F.2d 447 (4th Cir. 1976), *cert. denied*, 430 U.S. 959 (1977), on which appellants primarily rely, is inapposite. In *Boone* a police detective who had no authority to bind the state promised the witness that he would not arrest him for the crime under investigation or any other offense, and that he would use his influence with the Commonwealth Attorney to ensure that the witness would not be prosecuted. *Id.* at 449. The *Boone* court pointed out that "a promise to recommend leniency (without assurance of it) may be interpreted by the promisee as contingent upon the quality of the evidence produced." *Id.* at 451. That sort of situation is not presented here.

The appellants also contend that using a nonstatutory grant of immunity permitted the Government to elicit from Ciulla while he was on the stand the statement that he had been immunized in return for his complete and truthful testimony; if immunized formally Ciulla would only have been able to state that he was protected unless he was found to have testified falsely.[23] In the context of this case, we believe

[23] Under 18 U.S.C. § 6002, testimony or other information compelled under the statute may be used against the witness in "a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order."

that the semantic difference between the two is a difference without a distinction. Ciulla's statement did not, as appellants claim, allow the Government to vouch for its witness's credibility. In the case on which appellants primarily rely, the Ninth Circuit noted that prosecutorial vouching for the credibility of a Government witness occurs in two ways: "the prosecution may place the prestige of the government behind the witness [by personal assurances of the witness's veracity] or may indicate that information not presented to the jury supports the witness's testimony." *United States* v. *Roberts*, 618 F.2d 530, 533 (9th Cir. 1980). Neither was used here. The prosecutor merely requested Ciulla to describe his immunity agreement; he made no attempt to communicate the idea that the Government was thereby guaranteeing that Ciula was being truthful.

Unlike the appellants, we do not find our decision in *United States* v. *Miceli*, 446 F.2d 256 (1st Cir. 1971), relevant. In *Miceli* the Government stated in its closing argument that the principal Government witness had made an arrangement to testify truthfully about the transaction in which he was involved. *Id.* at 261. We were unable to determine from the record whether this comment by the prosecutor (not, as here, by the witness) was intended to express his personal opinion about the witness's veracity, which would be improper testimony by the Government attorney. In the absence of an objection, we refused to find that the remark was plain error. *Id.* We do not believe that the prosecutor's questions here can colorably be characterized as testimony. Moreover, there was no vouching for Ciulla's credibility by the prosecutor in his final argument.

We find the situation here analogous to that in *United States* v. *Craig*, 573 F.2d 513 (7th Cir.), *cert. denied*, 439 U.S. 820 (1978), in which a key witness testified on direct examination that she understood that under the terms of her immunity agreement, "my testimony or evidence that I will give will not be held against me as long as I tell the truth." *Id.* at 519.

The Seventh Circuit did not view the prosecutor's inquiry about the witness's understanding of the agreement as a form of vouching by the Government, and noted that not only did it aid the jury, it also often provided a fertile subject for cross-examination. *Id.* We agree with this assessment. *See United States* v. *Creamer*, 555 F.2d 612, 617-18 (7th Cir.), *cert. denied*, 434 U.S. 833 (1977). *But cf. United States* v. *Arroyo-Angulo*, 580 F.2d 1137, 1146-47 (2nd Cir.) (cooperation agreement properly introduced only on redirect examination when witness's veracity has been attacked; not reversible error in this case to introduce agreement on direct examination in view of inevitability of defense attacks on witness's credibility and vigor of attacks actually made), *cert. denied*, 439 U.S. 913, 1005 (1978), 439 U.S. 1131 (1979).

Nor do we think that the trial judge's jury instructions on Ciulla's immunity were a form of "judicial vouching." He repeated a key section of the agreement, adverted to the absence of a formal agreement, and strongly cautioned the jury to examine Ciulla's testimony with great care.[24] His instruction on this point benefited rather than injured the appellants.

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[24] The trial judge instructed the jury:

> Now, you have heard testimony that Anthony Ciulla in exchange for testifying truthfully, completely and fully has been granted immunity from the government. By that I mean, and you have heard testimony to the effect, that for testifying fully, truthfully and completely Mr. Ciulla will not be prosecuted for any crimes he may have admitted in his testimony here in court, or even out of court. One who testifies with the benefit of immunity, with a promise from the government that he will not be prosecuted, does not become an incompetent witness. His testimony may be received in evidence and considered by the jury, even though not corroborated or supported by evidence.
>
> Now, I have used the word "immunity" because, in my judgment, it is the word that applies. Immunity is usually a formal order, signed by the judge who grants it. There is no such order in this case, but, from the testimony, I believe that I am justified in telling you that the government has, in fact,

Further, the fact that the Special Attorney who reached the immunity agreement with Ciulla was also lead counsel for the Government at trial did not automatically make that attorney a witness in the case. Moreover, there was nothing to prevent the *appellants* from calling him to the stand, and there has been no showing that the Special Attorney was the only person competent to testify about the terms of the deal.

Finally, we do not agree that, in light of the sustained, and in some instances, successful attack on Ciulla's testimony, the Government knew or should have known that his testimony was false, thus triggering a duty to correct the record. In view of the great numbers of races, meetings, and phone calls recounted and the number of years between the events testified about and the trial itself, some errors in memory might be expected from any witness, without indicating that he or she was lying.

THE LEGAL SUFFICIENCY OF COUNT ONE — THE RICO CONSPIRACY COUNT

All appellants challenge Count One on the ground that the "case was tried as an invalid theory of RICO enterprise." The basis for this claim ended with the decision of the United States Supreme Court in *United States* v. *Turkette*, 49

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promised Anthony Ciulla will not be prosecuted for any of the crimes that have been alleged here and which he may have admitted. That is why I use the word "immunity."

This testimony should be examined by you with greater care than the testimony of an ordinary witness. You should consider that testimony and whether it is being affected by his personal interest, his personal advantage, any prejudice he might have against a defendant or any personal antagonism he might have. Also, you may consider the record of prior convictions in your evaluation of that witness's testimony; and, after such consideration, you may give the testimony of Mr. Ciulla such weight as you believe it deserves. I will repeat for you that the testimony may be received and considered by you, even though not corroborated by other evidence, and given such weight as you feel it should have. You must, however, keep in mind that the testimony is always to be received with caution and considered with great care.

U.S.L.W. 4743 (June 17, 1981), holding that the term "enterprise" as used in the Racketeer Influenced and Corrupt Organizations Act encompasses both legitimate and illegitimate enterprises. We find no merit in defendants' claim that Count One is unconstitutionally vague on its face or as applied, particularly in the light of *Turkette*.

The next RICO issue raised by all appellants is that Count One failed to allege any nexus between each defendant and two or more predicate crimes constituting a pattern of racketeering activity. This requires us to determine what must be charged in a RICO conspiracy count to make it legally sufficient.

We start with the basics:

> It is an elementary principle of criminal pleading, that where the definition of an offence, [*sic*] whether it be at common law or by statute, "includes generic terms, it is not sufficient that the indictment shall charge the offence [*sic*] in the same generic terms as in the definition; but it must state the species, — it must descend to particulars.

United States v. *Cruikshank*, 92 U.S. 542, 558 (1875). *See also Russell* v. *United States*, 369 U.S. 749, 765-66 (1926).

Here, as noted, the charge was conspiring to conduct the enterprise's affairs through a pattern of racketeering activity. In *Turkettee* the Supreme Court held:

> The "enterprise" is not the "pattern of racketeering activity"; it is an entity separate and apart from the pattern of activity in which it engages. The existence of an enterprise at all times remains a separate element which must be proved by the Government.

49 U.S.L.W. at 4745 (footnote omitted). A RICO conspiracy count must, therefore, charge an "enterprise" and "pattern of racketeering activity" separately. Enterprise "includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. § 1961(4).

"Racketeering activity" is defined exhaustively and specifically in 18 U.S.C. § 1961(1) (commonly referred to as "predicate crimes"). It includes "any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 224 (relating to sports bribery) . . . section 1952 (relating to racketeering). . . ."

Section 1961(5) states that a

> "pattern of racketeering activity" *requires at least two acts of racketeering activity,* one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act or racketeering activity[.] (emphasis added).

The statute, however, does not make clear the extent of the activity in which each defendant must engage to be culpable as RICO conspirators: must each RICO conspiracy defendant agree that someone in the enterprise will commit two predicate crimes, must each member agree to commit two such acts individually, or must each member actually commit two such acts individually?

Both the appellants and the Government agree that the conspiracy analysis in *United States* v. *Elliot,* 571 F.2d 880 (5th Cir.), *cert. denied,* 439 U.S. 953 (1978), is instructive on this question. Unfortunately, the appellants and the Government do not agree on what the Fifth Circuit meant in *Elliott.* In *Elliott* the court faced a gargantuan criminal scheme involving 6 defendants, 37 unindicted coconspirators, and, significantly, over 20 different criminal endeavors ranging from arson to murder to stealing meat and shirts. The court noted that, under pre-RICO conspiracy concepts, it doubted that a single conspiracy could be proved.[25] *Id.* at 902. Under RICO, however, a conspiracy of such diverse parts could ex-

[25] In contrast to the sprawling scheme in *Elliot,* the enterprise here had only one major goal — the fixing of horse races for profit — which it accomplished for the most part through a fairly predictable routine.

ist, but "[t]o be convicted as a member of an enterprise conspiracy, an individual, by his words or actions, must have objectively manifested an agreement to participate, directly or indirectly, in the affairs of an enterprise *through the commission of two or more predicate crimes.*" *Id.* at 903 (emphasis in original).

The Government argues that *Elliott* requires that a RICO conspiracy be established by proof that each defendant agreed to commit personally two or more predicate crimes constituting a pattern of racketeering activity. The appellants, while grudgingly admitting that the Government's view might be the least that *Elliott* requires, argue strenuously that the case should be read to require a defendant to manifest his agreement to participate in a RICO conspiracy by actually committing two or more predicate crimes.

In view of the fact that coconspirators need not have accomplished their underlying criminal goals to be found guilty of conspiracy, we find it difficult to accept the appellants' argument. *See United States* v. *Cruz*, 568 F.2d 781, 782-83 (1st Cir. 1978) (agreement is necessary to make out a conspiracy, but not to make out substantive crime; proof of substantive crime unnecessary to make out a conspiracy). We have found the rationale in *Cruz* applicable to RICO conspiracies. *United States* v. *DeVincent*, 632 F.2d 155, 159 (1st Cir. 1980) (substantive count, which did not allege conspiracy, separate from RICO conspiracy charge, in which actual commission of or attempt to commit substantive crime unnecessary). Requiring one to knowingly join an enterprise and agree to commit two or more predicate crimes provides sufficient protection to those who might otherwise be convicted through guilt by association. We, therefore, hold that a RICO conspiracy count must charge as a minimum that each defendant agreed to commit two or more specified predicate crimes in addition to charging an agreement to participate in the conduct of an "enterprise's" affairs through a "pattern of racketeering activity."

We now turn to Count One. Paragraph 1(e) charges that all defendants

> were employed by and associated with an enterprise as defined by title 18, United States Code, Section 1961(4), which enterprise was engaged in and the activities of which affected interstate commerce, to wit, a group of individuals associated in fact to fix horse races by bribery at various race tracks in the United States and to profit therefrom by wagering on the fixed races.

This was sufficient to charge a RICO enterprise.

Paragraph 2 charges a conspiracy to violate 18 U.S.C. § 1962(c).[26] Paragraph 3 charges that as part of the conspiracy the defendants would conduct "the enterprise's affairs through a pattern of racketeering activity." Paragraphs 4 through 12 allege specific predicate crimes committed by each defendant: Winter is charged with six (¶¶ 4, 5, 7, 8, 10, and 11); Martorano with four (¶¶ 4, 5, 8 and 10); Price with two (¶¶ 5 and 9); Goldenberg with two (¶¶ 5 and 9). James and Charles DeMetri are, however, named only in paragraph 12 (originally ¶ 13). We have no difficulty finding that, except as to the DeMetris, Count One is legally sufficient.

We next consider the sufficiency of Count One as it affects the DeMetris. The only paragraph in which the DeMetris are mentioned is number 12, which states:

> 12 [13]. It was further part of the conspiracy that the defendants Howard T. Winter, John Martorano, James Martorano, William Barnoski, Joseph M. McDonald, James L. Sims, Charles DeMetri, James DeMetri and unindicted co-conspirator Anthony Ciulla would purchase the horse Spread The Word for approximately $30,000, enter the horse in several races where it was planned that it would finish well out of the money because the horse would be held by the jockeys riding it in these races, and finally enter the horse in a race

[26] *See* n.4 *supra* (text of 18 U.S.C. § 1962(c)).

against inferior horses where it was planned that the horse would then win the race.

We find it difficult to construe this as alleging an agreement to commit even one predicate crime; clearly, it does not specify two predicate crimes. This paragraph is devoid of the words "bribery," and "fix or fixed races" that permeate the other paragraphs of Count one.[27]

The Government attempts to circumvent this omission by asserting that the DeMetris were properly charged with the

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[27] 4. ... to fix horse races by bribing jockeys, trainers, owners and racing officials to prevent certain horses from finishing in the top three positions in the races.

5. ... to arrange the terms on which wagering activities on fixed horse races would be handled and to collect monies resulting from wagers placed on fixed horse races.

6. ... would buy perfecta, exacta, trifecta and quinella tickets in large quantities at the race track on the fixed thoroughbred horse races.

7. ... would make telephone calls in interstate commerce and would discuss bets, wagers and other information concerning wagering on the fixed horse races.

8. ... would draw up lists of independent bookmakers in the New England area whom they would cheat by placing bets and wagers on thoroughbred horse races in which the outcomes had been, at least in part, pre-determined through the bribery of jockeys and trainers.

9. ... would cheat independent bookmakers by placing bets on thoroughbred horse races in which the outcomes had been, at least in part, pre-determined through the bribery of jockeys, and trainers.

commission of two predicate offenses in Counts Five[28] and Thirty-Two[29] of the indictment. Count One, however, does not incorporate by reference either Count Five or Count

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[28] *COUNT V*

On or about February 8, 1975, in the District of Massachusetts and in the State of New Jersey and elsewhere, the defendants

Howard T. Winter
John Martorano
James Martorano
William Barnoski
Joseph M. McDonald
James L. Sims
Robert Duda
Melvin Goldenberg
Douglas Morello
Elliot Paul Price
Richard Donati
Charles DeMetri, and
James DeMetri

did willfully and knowingly carry into effect and attempt to carry into effect a scheme in commerce to influence by bribery a sporting contest, to wit: the defendants engaged in a scheme to bribe jockeys in the ninth race at Garden State Park, Cherry Hill, New Jersey, on February 8, 1975, which scheme was effectuated by travel between the states of Massachusetts and New Jersey and elsewhere and by the use of interstate telephone facilities to place telephone calls between the states of Massachusetts and New Jersey, and elsewhere.

All in violation of Title 18, United States Code, Sections 224 and 2.

[29] *COUNT XXXII*

On or about February 1, 1975, in the District of Massachusetts, and in the State of New Jersey, the defendants

William Barnoski
Robert Duda
Richard Donati
Charles DeMetri, and
James DeMetri

did unlawfully, knowingly and willfully travel in interstate commerce between Massachusetts and New Jersey, said defendants intending to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, said unlawful activity be-

Thirty-Two and neither of them refers to Count One.[30] Only Count Two, which does not name the DeMetris as defendants, incorporates Count One by reference. The indictment as drawn does not admit of Counts Five and Thirty-Two being used as predicate crimes for Count One. "Each count in an indictment is regarded as if it was a separate indictment." *Dunn* v. *United States*, 284 U.S. 390, 393 (1932). "Each count must stand on its own, and cannot depend for its validity on the allegations of another count not specifically incorporated." *United States* v. *Fulcher*, 626 F.2d 985, 988 (D.C. Cir. 1980), *cert. denied*, 101 S. Ct. 116 (1981); *United States* v. *Huff*, 512 F.2d 66, 69 (5th Cir. 1975). We note also that out of forty-five overt acts, the DeMetris were named only in one, number 23, which states simply that they, along with other defendants, entered the horse Spread The Word in the ninth race at Garden State on February 8, 1975.

We find Count One legally insufficient as to Charles and James DeMetri because it fails to charge that they agreed to commit two predicate crimes. It must, therefore, be dismissed as to them and their convictions on it reversed.

The next question is whether there was misjoinder of the DeMetris. Federal Rule of Criminal Procedure 8(b) permits joinder if the defendants "are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses." The key words are the "same series of acts or transactions." We have here an indictment which originally consisted of fifty substantive counts, with forty-one of them going to the jury

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ing bribery in violation of New Jersey Rev. Stat. Section 5:5-71, and did thereafter perform, attempt to perform, and cause acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit: affecting by bribery the outcome of pari-mutuel thoroughbred horse races.

All in violation of Title 18, United States Code, Sections 1952 and 2.

[30] Incorporation by reference from one count to another is permitted under Federal Rule of Criminal Procedure 7(c)(1).

along with the RICO conspiracy count. Although DeMetris were charged on two substantive counts, Five and Thirty-Two, Thirty-Two charges only that they traveled from Massachusetts to New Jersey to engage in the scheme described in Count Five: "to bribe jockeys in the ninth race at Garden State Park, Cherry Hill, New Jersey, on February 8, 1975." The indictment alleged that twenty different races at various race tracks had been fixed (Counts Three through Twenty-Two). Defendants Winter and Martorano were charged with bribing jockeys in all twenty races; Price and Goldenberg were charged with bribery in seven races. As to these four defendants, with or without a RICO conspiracy count, the indictment fairly alleged the "same series of acts or transactions."[31] But we fail to see how Counts Five and Thirty-Two bring the DeMetris within the "series." The evidence shows that active participation by the DeMetris in race fixing was limited to the scheme using the horse Spread The Word. We think it significant that they were not specifically named in paragraph 10 of Count One[32] as those who were to share in the winnings from the fixed races.

The prejudice to the DeMetris in being joined as RICO conspirators and tried as part of a massive race fixing conspiracy is obvious. Count One included charges, substantiated by Ciulla's testimony, of the use of force and violence to ensure compliance with the bribes. The DeMetris were not implicated in this in any way. This case is totally different from *Schaffer* v. *United States*, 362 U.S. 511 (1960), in which the court held that the dismissal of a conspiracy count does not result in misjoinder as a matter of law. In *Schaffer* there were three substantive counts and one conspiracy count. The dis-

[31] This disposes of the claims of Price and Goldenberg that they were improperly joined.

[32] 10. It was further part of the conspiracy that the winnings from wagering inside and outside the race tracks would be brought to Somerville, Massachusetts and divided by the defendants Howard T. Winter, John Martorano, James Martorano, Joseph M. McDonald, James L. Sims, William Barnoski, and others and unindicted co-conspirator Anthony Ciulla.

trict court dismissed the conspiracy count at the end of the Government's case for failure of proof. In sustaining the finding of no prejudice by the district court and the court of appeals, the Court noted "the proof was carefully compartmentalized as to each petitioner." *Id.* at 515. That is not the case here; Ciulla's testimony flowed over the DeMetris like a river overrunning its banks. In *King* v. *United States*, 355 F.2d 700 (1st Cir. 1966), we observed:

> A joinder of offenses, or of defendants, involves a presumptive possibility of prejudice to the defendant, and of benefit to the court, by which term we include the government and the public. Although the two matters are disparate and difficult to compare, the prejudice may be relatively small, compared to the benefit, and hence tolerable.

Id. at 703. We do not think the prejudice to the DeMetris was within tolerable limits. With the RICO conspiracy count eliminated, the only link between the DeMetris and the other defendants was their joint participation in fixing one out of twenty races. Unlike *Schaffer*, the conspiracy count here went to the jury. In fact, after making the *Petrozziello* determination,[33] the court told the jury, "[y]ou may now consider all the evidence introduced at this trial in making your determination as to any of the defendants' participation in the offenses charged." The court thereby wrapped the DeMetris and the other defendants in the same blanket.

The DeMetris were prejuced beyond rescue in two ways. The RICO conspiracy count marked them indelibly as members of a massive race fixing ring that employed bribery and force and violence as its modus operandi, and the number of substantive counts and proof of fixed races in which they were not implicated could only have overwhelmed the judgment of the jury so as to make it extremely unlikely that they could consider the evidence as to the one race in which the DeMetris were involved dispassionately and in isolation.[34]

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[33] See next section of opinion.

[34] We do not reach the question of whether the district court abused its discretion in denying severance pursuant to Federal Rule of Criminal Procedure 14.

The convictions of Peter and Charles DeMetri are reversed.

There is one other challenge to the indictment, mainly implicating Count One, to be considered. Goldenberg claims that he was deprived of his right to be tried on the indictment as returned by the Grand Jury because the court "substantially" modified it after the evidence was closed and before submitting it to the jury.

It is "the settled rule in the federal courts that an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form. *Ex parte Bain*, 121 U.S. 1; *United States* v. *Norris*, 281 U.S. 619; *Stirone* v. *United States*, 361 U.S. 212." *Russell* v. *United States*, 369 U.S. 749, 770 (1962). Ancillary to this "is the rule that a portion of an indictment that the evidence does not support may be withdrawn from the jury and this is not an impermissible amendment, provided nothing is thereby added to the indictment, and that the remaining allegations charge an offense." 1 C. Wright, Federal Practice and Procedure § 127, at 274-75 [hereinafter Wright]; *see Salinger* v. *United States*, 272 U.S. 542, 548 (1926); *United States* v. *Coast of Maine Lobster Co.*, 557 F.2d 905, 909-10 (1st Cir.), *cert. denied*, 434 U.S. 862 (1977).

We examine the "modifications" of which Goldenberg complains. The deletion of paragraph 12[35] in Count One did not affect him at all because he was not named therein. His argument that the word "defendants" — which is followed by five names in apparent apposition — could include him is spurious. Overt Act 6 originally stated: "On August 1, 1974, Anthony Ciulla telephoned John Martorano from Rhode Island and told him to bet the horse Olympia Mike across the board through bookmakers Melvin Goldenberg, Douglas

[35] 12. It was further part of the conspiracy that the defendants, Howard T. Winter, John Martorano, James Martorano, Joseph M. McDonald, and James L. Sims, would use their reputations for violence to ensure that no independent bookmaker who had been defrauded by the defendants' bets and wagers on fixed thoroughbred horse races would fail to pay the defendants.

Morello and Elliot Paul Price in Las Vegas, Nevada." The court deleted everything after the words Olympia Mike. It also struck from the indictment Overt Act 13 in which it was alleged that an untried defendant (Joseph M. McDonald) stated that a jockey, Edward Donnally, "should be killed and his body placed in the backstretch at Suffolk Downs as a warning to other jockeys." The court also deleted Overt Act 17, which implicated by name only defendant Winter; John Martorano, not a defendant, was also named.

These deletions were clearly a matter of form, not substance; they in no way changed or altered the indictment as to Goldenberg.

JOINT ISSUES ON TRIAL INSTRUCTIONS

We next consider three questions raised by all appellants jointly concerning certain instructions by the trial court to the jury.

The Petrozziello Determination.

On the twenty-first day of trial, at the close of Ciulla's testimony, the trial judge told the jury that it could consider all of the evidence introduced at trial when determining the participation of any of the defendants in the offenses charged. A" defense counsel objected.

In *United States* v. *Petrozziello,* 548 F.2d 20 (1st Cir. 1977), we held that, in accordance with Federal Rule of Evidence 801(d)(2)(E), the trial judge rather than the jury must determine whether out-of-court declarations of coconspirators should be admitted against a defendant. *Id.* at 22. Because the judge is ruling on admissibility, not guilty or innocence, he or she is to use the ordinary civil standard in deciding whether a conspiracy has been proven: "if it is more likely than not that the declarant and the defendant were members of a conspiracy when the hearsay statement was made, and

that the statement was in furtherance of the conspiracy," then the statement is admissible. *Id.* at 23.

The appellants argue first that the trial judge did not apply the standard of proof mandated in *Petrozziello.*

In the course of the bench conference on this issue, he told counsel:

> I am only charged with finding that it is more likely than not that there is a conspiracy and that the defendants took part in it. I'm also charged to some extent with assessing his [Ciulla's] credibility. *And I do not find that he is so inherently incredible as to not even allow the case to go to the jury.*
>
> What you are arguing . . . is a Motion for Judgment of Acquittal. (emphasis added).

The judge reiterated later in the same conference that he felt it more likely than not that the declarant and the defendants were members of a conspiracy between December 1973 and November 1975 when the statements in question were made and that the statements were made in furtherance of the conspiracy. He found that Ciulla's testimony was credible and supported by independent evidence of toll records, registrations, and race charts and "that each defendant and each coconspirator had been involved sufficiently by nonhearsay evidence, including 801(d)(2) statements, which sufficiently indicate their involvement in this criminal enterprise." Such evidence left "very little choice except for the jury to believe him [Ciulla] or not."

It is apparent that the trial judge understood the standard set out in *Petrozziello,* but the timing of his decision was premature. He repeatedly relied on the "more likely than not" standard in making his decision, but made that decision based on the most important evidence in the Government's case, Ciulla's testimony. In *United States* v. *Ciampaglia,* 628 F.2d 632 (1st Cir.), *cert. denied,* 101 S. Ct. 365, 618 (1980), decided over a year after the trial in this case, we held that the trial court should make its final *Petrozzielo* determination

at the close of all the evidence, out of the hearing of the jury. *Id.* at 638. We noted in *Ciampaglia* that in adopting the "more likely than not" test, "we have implicitly anticipated that the defendant's evidence would be taken into consideration"; finding out-of-court declarations admissible after hearing only the prosecutor's evidence "would render almost meaningless any difference between the standard announced in *Petrozziello* and the prima facie standard that it replaced." *Id.* Thus appellants' first argument merges with their second: that the trial judge refused to consider any of the defendants' evidence when making the *Petrozziello* ruling.

In *Ciampaglia* the defendant-appellant's failure to object at trial to the timing of the district court's finding barred him from raising the point on appeal in the absence of plain error. Here, defense counsel specifically objected to the court making preliminary findings about the coconspirators without first hearing all the evidence, or at least hearing the evidence on the membership of the alleged conspiracy. Nevertheless, we do not agree that the trial judge committed reversible error in making the ruling during the Government's case. In this regard, we are influenced by the fact that the court was operating without the benefit of controlling legal precedent on this point.[35] We note also that defense counsel did not request a reconsideration of the court's ruling when all the evidence in the case had been presented. Of greatest importance to our decision, however, is the fact that we believe that a *Petrozziello* finding

[35] In *United States* v. *James*, 590 F.2d 575, 582-83 (5th Cir.) (in banc), *cert. denied*, 442 U.S. 917 (1979), the Fifth Circuit made prospective only the rule that the trial court must make the conspiracy finding at the conclusion of all the evidence. Similarly, the Eighth Circuit, in explaining that an explicit on-the-record determination regarding the admissibility of a coconspirator's statement was required in future trials, also found that the absence of such a determination in the case before it was not plain error given the absence of appellate guidance on the point. *United States* v. *Bell*, 573 F.2d 1040, 1044-45 (8th Cir. 1978).

We refused to find our holding in *Petrozziello* retroactive in *United States* v. *Mackedon*, 562 F.2d 103, 105 (1st Cir. 1977).

at the close of all the evidence in the case would have reached the same conclusion.

Most of the evidence presented by the appellants was directed at attacking Ciulla's credibility. Several of the appellants took the stand to deny either the occurrence of, or Ciulla's version of, the events described in the principal witness's testimony. Evidence was also introduced that, if believed, would directly contradict some of Ciulla's statements. In *United States* v. *Mackedon*, 562 F.2d 103, 105 n.2 (1st Cir. 1977), we noted in passing that we did not "understand why a court would be barred from finding a preponderance simply because all or most of the prosecution's case depends upon the credibility of one witness." We find here that the trial judge was not prevented from finding a preponderance in this case merely because the Government's case hinged on Ciulla's testimony. Moreover, we believe that the judge implicitly made such a finding by permitting the conspiracy charge to go to the jury.[36] It is apparent that because, after hearing all the evidence and observing the demeanor of all the witnesses in this case, the trial judge found there was sufficient evidence for the jury to find beyond a reasonable doubt that a conspiracy had been formed, he must also have found that a preponderance of the evidence supported the finding of such a conspiracy.

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[36] The judge's final jury instructions on this point followed the pattern set out in the pre-*Petrozziello* case of *United States* v. *Honneus*, 508 F.2d 56 (1st Cir. 1974), *cert. denied*, 421 U.S. 948 (1975). Under *Honneus* the jury was told, either before or immediately after the first instance of hearsay testimony, that the conspiracy itself and each defendant's participation in it had to be established by independent nonhearsay evidence, *id.* at 577, and that the hearsay evidence was not to be considered unless the jury was satisfied that the defendants were in fact members of the conspiracy. *Id.* at 576. Here the judge charged in part that "to determine whether a defendant was a member of an alleged conspiracy you can consider only that evidence, if any, pertaining to his own acts and statements" and that a defendant was not responsible for the declarations of other alleged participants until it was established beyond a reasonable doubt that a conspiracy existed and that the

Jury Instructions on Count One.

All remaining appellants also claim that the jury instructions on the RICO conspiracy count were fatally defective. We find nothing mortal, only one surface wound that does not come close to reversible error.

The trial judge began his instructions on Count One by reading 18 U.S.C. §§ 1962(c) and (d). The terms "enterprise," "conduct," "racketeering activity," "pattern of racketeering," and "interstate commerce" were correctly defined. The court then explained the elements of conspiracy and the proof required generally and in the context of this case. The Count One instruction was complete, even-handed, clear, and, except as discussed below, correct.

> Therefore, under the statutes, as distinguished from a simple conspiracy statute, you must find that the defendants did more than simply agree to join this conspiracy. You must find the following: that a defendant by his words or actions must have objectively manifested an agreement to wilfully participate, directly or indirectly, in the affairs of an enterprise through the commission of two or more offenses which make up the pattern of racketeering activity in this case, that is, *the bribery charges, the travel and use of interstate telephone charges, which are charged throughout the indictment.* (emphasis added).

Appellants contend that the italicized portion of the instruction erroneously incorporated the substantive Counts Three through Forty-Two into Count One. As already noted, there can be no assumed or implied incorporation of one count into another. But the question here is not the legal suf-

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defendant was one of its members, based upon the evidence of his own acts and statements. As we pointed out in *United States* v. *Fontanez*, 628 F.2d 687 (1st Cir. 1980, "[a]lthough the ghost of *Honneus* may still be flitting about, it causes no harm and ... is probably beneficial to a defendant." *Id.* at 689.

ficiency of the indictment; it is clear that Count One charged Winter, Martorano, Price, and Goldenberg with the requisite two predicate crimes. As to these appellants, the substantive counts were not necessary to flesh out an otherwise incomplete conspiracy count as they were for the DeMetris. As we read this part of the instructions, the jury was instructed that it could not find the appellants guilty of conspiracy unless it first found that they actually committed two predicate crimes. This was error in light of our holding that a RICO conspiracy count must allege only an agreement to commit two predicate crimes, not their actual commission. The error, however, benefitted the appellants; it required the Government to prove more than was necessary. Indeed, this is what appellants have urged is required for a RICO conspiracy.

Appellants' claim of error as to the mid-deliberation instruction has not even a semblance of validity. On the second day of deliberations the jury requested "the legal definition of a conspiracy." Contrary to appellants' assertions, the court did not merely repeat its original conspiracy instruction. It used, insofar as possible, different words and phrases to explain to the jury again the elements of Count One and the proof required. A jury request for a clarification of an instruction of a legal definition already given is particularly difficult to satisfy when, as here, the original was complete and essentially correct.[37] Because the new instruction must both be given in English and be legally sound, it is bound to follow the original.

The instructions on Count One did not amount to reversible error as to Winter, Martorano, Price and Goldenberg.

Instructions On Intent.

In the course of his instructions on intent, the trial judge told the jury that:

[37] The court repeated its original error as to the necessity of committing two or more offenses.

> An act is done wilfully if done voluntarily and intentionally and with the specific intent to do something the law forbids, that is to say with a bad purpose either to disobey or disregard the law.
>
> An act is done knowingly, if it is done voluntarily and intentionally and not because of mistake or accident or other innocent reason. The purpose of adding the word "knowingly" is to insure that no one will be convicted for an act done because of a mistake or an accident or other innocent reason.
>
> Knowledge and intent exist in the mind. Since it is not possible to look into a man's mind or a person's mind to see what went on, the only way you have for arriving at a decision in these questions is for you to take into consideration all the facts and circumstances shown by the evidence, including the exhibits, and to determine from all such facts and circumstances whether the requisite knowledge and intent were present at the time in question.
>
> Direct proof is unnecessary. Knowledge and intent may be inferred from all the surrounding circumstances. *As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable or ordinary consequences of his acts.*

(emphasis added). Counsel objected to this charge, although their objections were hardly a model of specificity.[38]

The emphasized portion of the judge's charge is substantially identical to the jury instruction declared unconstitutional[39] by the Supreme Court in *Sandstrom* v. *Montana*, 442

[38] Besides two general objections to the charge, one attorney mentioned that the instruction "reminded" him of a Supreme Court decision, as well as a recent article on statutory presumptions, and that he felt that the instruction was a deprivation of the "Fifth Amendment right not to have to produce any evidence."

[39] The precise language condemned by the Supreme Court in *Sandstrom* was "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts." *Sandstrom* v. *Montana*, 442 U.S. 510, 513 (1979).

U.S. 510 (1979), which was decided on June 18, 1979, the twenty-seventh day of trial in this case. The appellants argue that use of this instruction was particularly prejudicial because the element of intent is especially important in a RICO conspiracy trial. Without clear instruction on intent, they claim a jury would be unable to separate "'guilt by association' from guilt established by the evidence in accordance with the law."[40]

The key to determining whether the instruction operated to deny the appellants' constitutional rights is the actual effect of that charge on the jury. *Id.* at 514; *McInerney* v. *Berman*, 621 F.2d 20, 23 (1st Cir.), *cert. denied*, 1010 S. Ct. 201 (1980). *Sandstrom* v. *Montana* holds that the instruction given here, which a reasonable juror could have viewed as a mandatory presumption, 442 U.S. at 515, that was either irrebuttable, or that shifted the burden of persuasion to the defendant on the element of intent, *id.* at 517, was unconstitutional. *Id.* at 524. The Court also mentioned in a footnote that the potential for the jurors adopting either of these interpretations of the presumption was not removed by the other instructions given by the trial judge: that the accused was presumed innocent until proven guilty and that the State had the bruden of proving beyond a reasonable doubt that the accused caused the death of the decedent purposely or knowingly. *Id.* at 518 n.7.[41] The Government argues that this comment by the Court "strongly" implies that other specific instructions could have

[40] In view of the Supreme Court's statement in *Turkette* that the existence of an enterprise and of a pattern of racketeering activity must be separately proven, *United States* v. *Turkette*, 49 U.S.L.W. 4743, 4745 (June 17, 1981), and our holding in this case that each defendant in a RICO conspiracy case must be charged with agreeing to commit personally at least two predicate crimes, we do not believe that a jury would be placed in such a quandary.

[41] Consideration of the other instructions given at trial in determining the effect of the presumption instruction on the jury is consistent with the view of the Court that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." *Cupp* v. *Naughten*, 414 U.S. 141, 146-47 (1973).

cured the effect of the presumption instruction. *Cf. United States* v. *Spiegel*, 604 F.2d 961, 969 n.15 (5th Cir. 1979), *cert. denied*, 446 U.S. 935 (1980) (one possible reading of *Sandstrom* could allow other instructions to cure presumption instruction).

Generally speaking, we do not think that the intent instruction as a whole, even when coupled with the trial court's general instructions here that the prosecution always has the burden of proving each element of the crime and that no defendant has the burden of producing any evidence, obviates the possibility that jurors could give the presumption conclusive or persuasion-shifting effect. *See* 442 U.S. at 519. Therefore, in light of *Sandstrom*, we believe it is always error to instruct the jury that a person is presumed to intend the natural and probable or ordinary consequences of his acts, and we hold that this sort of instruction should not be used. *See United States* v. *Ariza-Ibarra*, 605 F.2d 1216, 1227-28 (1st Cir. 1979) (cautioning lower court to avoid language that it is ordinarily reasonable to infer person intends natural and probable consequences of acts knowingly done or knowingly omitted).

Nevertheless, in this case we find the error was harmless beyond a reasonable doubt, because it did not contribute to the defendants' convictions.[42] *Chapman* v. *California*, 386 U.S. 18, 23, 24 (1967). An error is not harmless if there exists a "reasonable possibility that the evidence [error] complained of might have contributed to the conviction." *Id.* at 23 (quoting *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963)); *accord, United States* v. *Harrigan*, 586 F.2d 860, 863 (1st Cir. 1978) (erroneous instruction on burden of proof not harmless error; instruction may have made difference between acquit-

[42] The Court in *Sandstrom* refused to decide whether the use of this instruction could constitute harmless error under *Chapman* v. *California* even if the jury had relied upon it, because the Supreme Court of Montana had not yet considered the issue. 442 U.S. at 526-27. It noted that the state court would be free to consider the issue on remand if it wished. *Id.* at 527.

tal and conviction). The challenged instruction, however, makes no sense in the context of this trial. Despite their objections to the charge, the appellants are not claiming that they did not intend the natural and probable or ordinary consequences of their acts. *See Holloway* v. *McElroy*, 632 F.2d 605, 618 (5th Cir. 1980) (defendant did not claim he did not intend to shoot victim, but that homicide was justified), *cert. denied*, 49 U.S.L.W. 3881 (May 26, 1981). Rather they deny doing what the Government has alleged that they did: meet at Marshall Motors, use the telephone to carry out bribery, downgrade Spread The Word, distribute the proceeds of unlawful activity, cause Ciulla to travel to various states to fix horse races, and the like. In contrast, the defendant in *Sandstrom* admitted that he had killed the deceased; his defense was that he had not intended to do so. If the jury assumed that Sandstrom intended the natural consequences of his act — the death of his victim — it would have had to have found that the defendant acted "purposely or knowingly" and was guilty of deliberate homicide, despite his claim that he was guilty of a lesser crime because he did not act purposely or knowingly. 442 U.S. at 512.

The same pattern may be found in other leading presumption cases. Thus in *Morissette* v. *United States*, 342 U.S. 246 (1952), the defendant freely admitted removing spent bomb casings to sell as salvage from a federal bombing range. *Id.* at 247. He maintained, however, that he had no intention of stealing, but had thought that the property was abandoned and of no value to the Government. *Id.* at 248. The Court condemned the trial court's supposition that the only question was whether the defendant intended to take the property. The admitted and intentional act of removing the casings was not alone an adequate ground on which the jury could find criminal intent; such intent could only be determined after considering the defendant's testimony and all the circumstances surrounding the act of taking, as well as the act itself. *Id.* at 276; *accord, United States* v. *United States Gypsum Co.*, 438 U.S. 422, 429-30, 434 (1978) (striking down

charge that if jury found admitted exchanges of price information affected prices, then parties involved presumed as matter of law to have intended that result).

We rule that there was no reasonable possibility that this instruction, which was so ill-suited to both the theory on which the case was tried and the evidence that was presented, contributed to the appellants' convictions. *Cf. United States* v. *Continental Group, Inc.*, 603 F.2d 444, 464 (3d Cir. 1979) (no error in using this instruction because, unlike use in *Sandstrom*, use here did not relieve burden of proving any element of crime charged), *cert. denied*, 444 U.S. 1032 (1980). Its use, therefore, was harmless error.

Other Objections to Jury Instructions

The appellants raise objections to the trial court's jury instructions as they specifically affect their individual cases. We turn now to these contentions.

"Theory of the Case" Instruction.

Martorano and Winter requested the following jury instruction:

> [T]he defendant's position is that he was not involved in a conspiracy or scheme to fix horseraces by bribery at various racetracks and to profit therefrom by wagering on the fixed races. It is James Martorano's [Winter's] position that Anthony Ciulla must have falsely testified against him for reasons of his own, such as to obtain his own freedom from imprisonment by providing a target for prosecution other than himself and to obtain money from the Government and publishers.

At a bench conference on requested instructions, the court told Winter's attorney that he intended to give this "theory of the case" instruction "not in your language, as I remember it; but in substance, yes." Based on this assurance, counsel

for both defendants argued to the jury that Ciulla had testified falsely against their clients for his own reasons. They argue now that the trial judge did not give the requested instruction to the jury and that they were entitled to a requested instruction on any defense theory with a foundation in the record.

Whatever the merits of appellants' legal arguments, we agree with the Government that the judge's instruction met their request. He charged the jury:

> Now, you have heard testimony that Anthony Ciulla in exchange for testifying truthfully, completely and fully has been granted immunity from the government. By that I mean, and you have heard testimony to the effect, that for testifying fully, truthfully and completely Mr. Ciulla will not be prosecuted for any crimes he may have admitted in his testimony here in court, or even out of court.
>
> . . . .
>
> This testimony should be examined by you with greater care than the testimony of an ordinary witness. You should consider that testimony and whether it is being affected by his personal interest, his personal advantage, any prejudice he might have against a defendant or any personal antagonism he might have. Also, you may consider the record of prior convictions in your evaluation of that witness's testimony; and, after such consideration, you may give the testimony of Mr. Ciulla such weight as you believe it deserves. I will repeat for you that the testimony may be received and considered by you, even though not corroborated by other evidence, and given such weight as you feel it should have. You must, however, keep in mind that the testimony is always to be received with caution and considered with great care.

The judge also gave extensive instructions on assessment of witness credibility,[43] as well as an accomplice instruction.[44]

A trial judge is under no obligation to deliver a requested instruction verbatim. *United States* v. *Irwin*, 593 F.2d 138, 141 (1st Cir. 1979); *United States* v. *Coast of Maine Lobster, Inc.*, 557 F.2d 905, 909 (1st Cir.), *cert. denied*, 434 U.S. 862 (1977). Rather, the instruction as given must communicate to the jury the substance of the request. 593 F.2d at 140; 557 F.2d at 909. The judge's instructions in this instance clearly conveyed to the jury not only the substance of Martorano's and Winter's request, but also the heart of their theory: that Ciulla had lied for his own benefit. *See* 593 F.2d at 140-41. Martorano and Winter were not prejudiced by the trial court's charge.

In view of our disposition of this issue, we do not reach Martorano's and Winter's argument that they were misled when the trial judge failed to give the requested instruction after assuring them that he would do so.

Character Evidence Instruction.

In addition to testifying himself, Goldenberg called several character witnesses to testify on his behalf. Among them were the director of hotel operations at the Stardust Hotel in Las Vegas, where Goldenberg was employed from April 8,

[43] In the course of these instructions, the judge advised the jury that witnesses could be judged by "their bias, their interest, their perception, their memory, their narration, their reputation." He instructed them to "[s]crutinize the witness's intelligence, motive, state of mind, demeanor, candor and fairness. Does the witness have an interest in the outcome of the case? That is not unusual. Most witnesses do. But, if so, does that interest affect the truthfulness of the witness's testimony?"

[44] As part of this instruction, the court noted that the jury could find that Ciulla had been an accomplice of one or more of the defendants in the case. He instructed the jury that the testimony of such an accomplice "is always to be received with caution and considered with great care."

1968 through October 8, 1974; a lieutenant in the Las Vegas police department, who from August 1974 to August 1977 headed the intelligence unit that gathered information on gambling, and who was, as a result, familiar with Goldenberg's general routine; the Director of Security for the Sheraton Corporation, who also spent 14 of his 26 years as an FBI agent in Las Vegas, and whose tasks from 1973 to 1977 included investigating interstate sports betting and bookmaking; a retired FBI agent who had been assigned to Las Vegas from 1971 through 1977 and had headed the intelligence squad that gathered gambling information from 1975 to 1977; and an undersheriff of the Las Vegas police department. Goldenberg requested that the judge give the following instruction on character evidence to the jury:

> The jury is instructed that evidence of an established reputation for honesty, veracity and integrity may be such to raise a reasonable doubt that will *alone* justify an acquittal. Proof of a good reputation for honesty, veracity and integrity of one indicted for an offense which by his [*sic*] very nature implies lack of moral rectitude *may well by itself, if believed by the jury, create such a reasonable doubt as to justify acquittal* notwithstanding the convincing nature of other evidence in the case.

(emphasis added). The judge instead instructed the jury as follows:

> Next there were character witnesses. There was evidence offered and admitted which tended to show the good repuation of a defendant in his community prior to the indictment in this case. Such evidence may indicate to you that it is improbable that a person of good character would commit the crimes charged, and, therefore, cause you to have a reasonable doubt.
>
> You should consider this evidence along with all of the other evidence in the case in determining the guilt or innocence of the defendant.

Goldenberg argues here that failure to give his requested character instruction, which he asserts was authorized in *Michelson* v. *United States*, 335 U.S. 469 (1948), was reversible error. In *Michelson* the Court, in the course of deciding the proper scope of cross-examination of a defendant's character witnesses, noted that it had held that:

> [A]ffirmative testimony that the general estimate of . . . [a defendant's] character is so favorable that the jury may infer that he would not be likely to commit the offense charged . . . may be enough to raise a reasonable doubt of guilt . . . and a jury in a proper case should be so instructed.

Id. at 416 (citing *Edgington* v. *United States*, 164 U.S. 361). Leaving aside the question whether *Michelson* may have misread *Edgington*,[45] the circuit courts, despite this language

[45] In *Edgington* the Court was considering a charge on good character that instructed the jury that such evidence could be considered only if the rest of the evidence created a doubt about the defendant's guilt. *Edgington* v. *United States*, 164 U.S. 361, 365-66 (1896). In passing upon this instruction, the Court said:

> Whatever may have been said in some of the earlier cases, to the effect that evidence of good character of the defendant is not to be considered unless the other evidence leaves in the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

Id. at 366. This is not a holding that an instruction on the effect of good character evidence "standing alone" must be given, *see Michelson* v. *United States*, 335 U.S. 469, 476 (1948), and, as the Ninth Circuit pointed out, *Edgington* was striking down a limitation on the use of character evidence, not requiring "that the lack of limitation must be expressly pointed out to the jury." *Carbo* v. *United States*, 314 F.2d 718, 746 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964); *cf. Black* v. *United States*, 309 F.2d 331, 344 (8th Cir. 1962) (nothing in *Michelson* inconsistent with interpreting *Edgington* as not requiring "standing alone" instruction), *cert. denied*, 372 U.S. 934 (1963).

in *Michelson*, have split on the permissibility of a good character "standing alone" charge. Some circuits allow such a charge, at least under certain circumstances. *See, e.g., United States* v. *Callahan*,[46] 588 F.2d 1078, 1085 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979); *United States* v. *Lewis*, 482 F.2d 632, 637 (D.C. Cir. 1973); *Oertle* v. *United States*, 370 F.2d 719, 726-27 (10th Cir. 1966) (in banc), *cert. denied*, 387 U.S. 943 (1967); *United States* v. *Donnelly*, 179 F.2d 227, 233 (7th Cir. 1950); *cf. United States* v. *Foley*, 598 F.2d 1323, 1337 (4th Cir. 1979) (declining to hold that "standing alone" instruction could never be required; not required when defendants did not rely solely on character evidence for their defense), *cert. denied*, 444 U.S. 1043 (1980). Other circuits

[46] *But see United States* v. *Fontenot*, 483 F.2d 315, 323 (5th Cir. 1973) (rejecting claim that "standing alone" instruction must be given; charge that character evidence should be considered along with all other evidence proper). The defendant in *Callahan* did not request a "standing alone" charge, but argued on appeal that the instruction given implied to the jury that it was to disregard good character if other evidence pointed to guilt. *United States* v. *Callahan*, 588 F.2d 1078, 1084 (5th Cir.), *cert. denied*, 444 U.S. 826 (1979). The opinion actually cited *Fontenot* in the course of discussing another recent Fifth Circuit precedent, *United States* v. *Leigh*, 513 F.2d 784 (5th Cir. 1975), which noted that an instruction that good reputation alone may create a reasonable doubt on guilt more than met the "minimum content instruction" in that circuit that such evidence, considered with all other eivdence, may create such reasonable doubt. *Id.* at 785 (citing *United States* v. *Fontenot*, 483 F.2d 315, 323 (5th Cir. 1973)). In another case in this area, *United States* v. *Furr*, 528 F.2d 578 (5th Cir. 1978) (per curiam), the Fifth Circuit said that a charge that stated that reputation evidence alone could create a reasonable doubt was a component of the instruction held not to be plainly erroneous in *Fontenot*. *Id.* at 579. In *Fontenot*, of course, one of the bases for defendant's objections was that the charge did not include the standing alone language, but emphasized that this evidence was to be considered along with all the evidence in the case. 483 F.2d at 323. It should be noted that the propriety of using the "standing alone" terminology was not precisely at issue in either *Furr* or *Leigh*; in each case the trial judge had instructed the jury that character evidence alone could create a reasonable doubt.

have rejected the use of this instruction. *See, e.g., United States* v. *Fayette*, 388 F.2d 728, 737 (2d Cir. 1968); *Carbo* v. *United States*, 314 F.2d 718, 746-47 (9th Cir. 1963), *cert. denied*, 377 U.S. 953 (1964); *Black* v. *United States*, 309 F.2d 331, 343-44 (8th Cir. 1962), *cert. denied*, 372 U.S. 934 (1963).

Unfortunately for Goldenberg, this circuit has placed itself in the latter camp. *See United States* v. *Lachmann*, 469 F.2d 1043, 1046 (1st Cir. 1972), *cert. denied*, 411 U.S. 931 (1973). Although the *Lachmann* opinion did not specifically state what instruction the defendant in that case wanted, its citation of many of the leading cases on the subject and its disapproval of the opposing doctrine as set forth in *Oertle* v. *United States*, 370 F.2d at 726-27, indicate that this circuit has decided that the instruction requested by Goldenberg need not be given. *Lachmann* found the trial court's instruction to consider the "evidence concerning the defendant's reputation for honesty ... together with all the other evidence in the case, in determining the guilt or innocence of the defendant," to be "quite sufficient." *Lachmann* at 1046 & n.3. We reiterate our disapproval of the *Oertle* line of cases. We do not think it the proper function of the trial judge to instruct the jury as to the weight it can or may give to any particular evidence that it believes. Rather, it appears to us to be a usurpation of the jury's special function. The charge in *Lachmann* that "you should consider this evidence and give it such weight as you believe it deserves," *id.*, was, in our opinion, clearly correct. We doubt that under the *Oertle* doctrine Goldenberg would have been entitled to a good character "standing alone" charge. We are certain that under the law of this circuit the district court did not err in refusing to instruct the jury that character evidence alone may raise a reasonable doubt as to guilt.

Goldenberg also claims that the trial judge's charge failed to satisfy even the *Lachmann* standard, because it instructed the jury to consider character evidence along with all other evidence in the case in determining guilt or innocence. He

theorizes that this might have suggested to the jury that it was required to dilute the reasonable doubt raised by the character evidence (if any such doubt was raised) with incriminating evidence. He argues that insisting on this standard is not the same as insisting on a "standing alone" instruction.

Not only does this argument signal that Goldenberg has missed the point of the *Lachmann* line of cases, it also indicates that he has not read the *Lachmann* opinion itself very closely. The trial judge in *Lachmann* told the jury that

> evidence concerning the defendant's reputation for honesty should be considered by you, *together with all the other evidence* in this case, in determining the guilt or innocence of the defendant. If, *when considered with all the other evidence* presented during this trial, it creates a reasonable doubt in your mind as to the guilt of the defendant, you should find him not guilty.

469 F.2d at 1046 n.3 (emphasis added). Appellant's dilution contention is frivolous.

OTHER CLAIMS OF ERROR

The appellants raise several other objections to rulings by the court below. We now consider those claims that merit discussion.

Severance and Transfer.

Price and Goldenberg claim that they were improperly joined and that their cases should have been severed and transferred to Las Vegas, Nevada. We have already concluded that their initial joinder was proper.[47] We also find that they were not entitled to a severance under Federal Rule

[47] *See* n.31 *supra* and accompanying text.

of Criminal Procedure 14.[48] To prevail on this claim before the trial judge, Price and Goldenberg were required to "make a 'strong showing of prejudice' likely to result from a joint trial"; the denial of such a motion may be overturned only if an abuse of discretion is shown. *United States* v. *Thomann*, 609 F.2d 560, 564 (1st Cir. 1979); *United States* v. *Luna*, 585 F.2d 1, 4-5 (1st Cir.), *cert. denied*, 439 U.S. 852 (1978). Neither the fact that Price's and Goldenberg's involvement in the scheme was not as extensive as that of Winter and Martorano nor their claims that they would be prejudiced by vast amounts of testimony pertinent to other defendants, but not to them, is sufficient, "either separately or in combination, to render denial of severance an abuse of discretion." *United States* v. *Smolar*, 557 F.2d 13, 21 (1st Cir.), *cert. denied*, 434 U.S. 866, 966, 971 (1977). The Seventh Circuit, in a case cited by Goldenberg, has stated that a defendant is not entitled to a separate trial only because it would provide him or her with a better chance of acquittal; a severance is mandated only when the defendant will otherwise be denied a fair trial. *United States* v. *Alpern*, 564 F.2d 755, 758 (7th Cir. 1977); *see United States* v. *Calabrese*, 645 F.2d 1379, 1385 (10th Cir. 1981). Assuming that the trial judge was swayed by considerations of judicial economy, as Price and Goldenberg claim, such considerations are relevant when there is a reasonable assurance that the defendants will receive a fair trial if not severed. *United States* v. *Boscia*, 573 F.2d 827, 833 (3d Cir.),

[48] This rule provides:

Rule 14. Relief from Prejudicial Joinder

If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires. In ruling on a motion by a defendant for severance the court may order the attorney for the government to deliver to the court for inspection *in camera* any statements or confessions made by the defendants which the government intends to introduce in evidence at the trial.

cert. denied, 436 U.S. 911, 439 U.S. 854 (1978). Appellants received such a trial here.

Nor do we think that the trial judge improperly denied Price's and Goldenberg's motions for transfer under Federal Rule of Criminal Procedure 21.[49] Turning first to their motions to transfer under Rule 21(b), we note that the trial court's decision to deny a change in venue is reviewable under the abuse of discretion standard. *United States* v. *Calabrese,* 645 F.2d at 1384; Wright § 344 at 637. Despite the distance between Las Vegas and Boston, Price and especially Goldenberg were able to call many witnesses from Nevada to testify on their behalf. The other defendants lived in New England, as did many of the Government's witnesses, and even some of Goldenberg's witnesses. (It is not clear where Tildsley, who was convicted but has not appealed, resided.) Obviously, to grant Price's and Goldenberg's motions for transfer would in effect grant their motions for a severance. The trial judge did not abuse his discretion in refusing to transfer the case under Federal Rule of Criminal Procedure 21(b).

As a final variation on this theme, Price and Goldenberg claim that the trial judge was presented not just with a discretionary invocation of Rule 21(b), but with a question of constitutional dimensions, stemming from the nature of the

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[49] This rule provides in pertinent part:

Rule 21. Transfer from the District for Trial

(a) For Prejudice in the District. The court upon motion of the defendant shall transfer the proceeding as to him to another district whether or not such district is specified in the defendants' motion if the court is satisfied that there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and imparial trial at any place fixed by law for holding court in that district.

(b) Transfer in Other Cases. For the convenience of parties and witnesses, and in the interest of justice, the court upon motion of the defendant may transfer the proceeding as to him or any one or more of the counts thereof to another district.

charges and their gambling-oriented backgrounds. In support of their position, they present the novel theory that denial of their motions violated their right to a jury selected from a fair cross-section of the community, because Massachusetts jurors would attach a stigma of illegality to Goldenberg's and Price's employment in the gambling industry, but Nevada jurors would not. Moreover, jurors selected from a community such as Nevada, which has accepted gambling as a matter of public policy, would be better able than jurors drawn from Massachusetts to assess the Government's theory of illegal gambling. Trial in Boston, they claim, inevitably caused an irremediable flaw in the jury selection process: the systematic exclusion of "persons with a familiarity with the gambling motif."[50] This argument is groundless as well as ridiculous. This case involves the "sport of kings" with which even the puritanical citizens of Massachusetts are familiar, some even to the point of addiction. We are concerned here not just with gambling, but with fixing races so that the element of chance is entirely eliminated. We would suspect that the defendants' approach to horse racing would be as offensive to the citizens of Nevada as to those of Massachusetts if not more so, because Nevada's main source of income derives from those who believe that they have a chance to win, be it at the roulette table or the race track.

Refusal to Admit Polygraph Evidence.

Price contends that the trial judge committed reversible error by refusing to allow him to present polygraph evidence to support his credibility against Ciulla's. Without deciding whether a *per se* prohibition against the use of lie detector tests is appropriate, we find that the trial judge acted within his discretion in refusing to admit such evidence in this case. *See United States* v. *Truong*, 629 F.2d 908, 930 n.27 (4th Cir. 1980) (no need to pass on admissibility of unstipulated lie

[50] Neither Goldenberg nor Price has challenged the selection of the jury on federal statutory grounds. *See* 28 U.S.C. § 1867.

detector test results because district judge did not abuse discretion by excluding them in this case).

Allegation of Prosecutorial Misconduct.

Before the trial began, appellant Price filed a motion to suppress his grand jury testimony of April 13, 1978, on the grounds that the Assistant United States Attorney prosecuting the case misled Price into waiving his constitutional rights and testifying before the grand jury by informing him that he was not a target of the grand jury investigation when he was, and failed to keep his commitment that Price would not be indicted if he testified before the grand jury unless evidence to corroborate Ciulla's testimony about him subsequently developed. Price claims that if his attorney had known that his client was a target, he would "undoubtedly" have urged Price to claim his privilege against self-incrimination or possibly have requested use immunity for him in exhange for his cooperation with the Government.

The Government did not use this testimony in its case-in-chief. Price, however, claims that his testimony was "undoubtedly used" to refresh Ciulla's memory before he testified before the grand jury that indicted Price in February 1979. He argues that because this testimony was developed through exploiting testimony unfairly obtained from him, it would not be used against him.

The trial judge conducted a lengthy pretrial hearing on this issue, permitting one of Price's attorneys to examine his co-counsel, the prosecutor, and the FBI agent assigned to the case. Following the hearing, the judge denied the motion. In a written opinion he concluded that: (1) Price was not a "target" when he appeared before the grand jury; (2) the Government did not have a sufficient basis for an indictment until it had received further evidence following Price's grand jury testimony; (3) Price was not misled, deceived, or trapped into testifying before the grand jury and his privilege not to testify was not impaired by the prosecution's conduct.

Because Price has raised what is essentially a due process claim, the key inquiry is not whether Price was technically a target, but whether the prosecutor either actually misled Price and his attorney about Price's status or made and then broke a commitment not to ask for Price's indictment unless he obtained evidence to corroborate Ciulla's story. Price's attorney testified that the prosecutor advised him by phone that, although Ciulla had furnished the Goverment with information concerning Price's alleged involvement in this scheme, he did not regard Price as a target and that "in no way would Price be indicted." The prosecutor, who produced a signed summary of this conversation that he had prepared at the end of the phone call, testified that, when asked, he told Price's attorney that he did not consider Price to be a target, but that he did consider him to be a subject.[51] He denied ever telling Price's lawyer that Price would not be indicted or that he would not be indicted solely on the basis of Ciulla's testimony. He also testified to a brief conversation with Price's attorney outside the grand jury room on the day that Price testified, during which he told Price's counsel that he would inform Price that he was a subject, not a target.

Before Price testified, the Assistant United States Attorney warned him that he had a fifth amendment right to refuse to answer questions or to produce personal documents

[51] The prosecuting attorney testifed that when defense counsel asked him if he viewed Price as a target, he responded "that target had a very technical meaning to me as defined in the United States Attorney's manual, and at ... [that] time I did not consider Mr. Price a target but I did consider him to be a subject."

The guidelines mentioned were not made part of the record in this case. In *In re Angiulo*, 579 F.2d 104 (1st Cir. 1978), we discussed the 1977 guidelines given to United States Attorneys, noting that "target" was defined as " 'a person as to whom the prosecutor or the grand jury has substantial evidence linking him to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant' " and that "subject" was defined as " 'a person whose conduct is within the scope of the grand jury's investigation.' " *Id.* at 105 n.1 (quoting guidelines).

that might tend to incriminate him, that any such answers or documents could be used against him in a court of law, that he had a right to an attorney, and a right to consult with that attorney outside the grand jury room at reasonable intervals. The prosecutor ascertained for the record that Price's attorney was out in the hall. He then stated:

> Prosecutor: Okay. Now I also want to indicate to you, sir, that you are not a target of the Grand Jury. That means that you are not subpoenaed —
>
> Price: I understand.
>
> Prosecutor: Well, I want to explain on the record anyway. You are not subpoenaed here today because there is evidence at this particular point in time which is being entertained by the Grand Jury upon which could be sought an indictment of you; however, your name, in the activities that Mr. Ciulla and others are in, specifically, as they relate to Las Vegas, has come up in the Grand Jury investigation. That is why you are here. You understand that?
>
> Price: Yes.

Unfortunately, as he later admitted in his testimony at the suppression hearing, the prosecutor did *not* inform Price that he was a subject. Nevertheless, we do not believe that under the circumstances presented here, Price could possibly have been misled into waiving his rights. Although the term "subject" was not specifically used, Price was warned that, although the grand jury was not considering evidence upon which he could be indicted "at . . . [that] particular point," his name had come up in the grand jury investigation in connection with the activities of Ciulla and others in Las Vegas. His counsel, whom the district court found had been informed that Price was considered a subject, remained in the corridor outside the grand jury room while Price was being examined,

and Price consulted with him during the examination on another point.

The prosecutor's other warnings more than fulfilled any constitutional requirement, especially because "potential-defendant warnings add nothing of value to protection of Fifth Amendment rights." *United States* v. *Washington*, 431 U.S. 181, 189 (1977); *cf. United States* v. *Crocker*, 568 F.2d 1049, 1056 (3d Cir. 1977) (although assistant United States attorney may have misled defendant's attorney by suggesting defendant not a target when he appeared before grand jury, statement not a due process violation when Supreme Court had held he need not say anything).

The trial court did not decide whether the prosecutor had made any promises to Price about whether or not he would be indicted on the basis of Ciulla's grand jury testimony. Instead he considered the evidence adduced at the hearing to conclude that Price was not a target when he appeared before the grand jury, but that later-discovered evidence supported Ciulla's information and formed a sufficient basis for Price's indictment. We do not find it necessary to reach this issue, because we do not believe that Price has satisfied by the preponderance of the evidence his burdens as moving party of production and persuasion on the issue of whether an agreement was made. *See, e.g., Franks* v. *Delaware*, 438 U.S. 154, 156 (1978) (if hearing is held on truthfulness of factual statement in affidavit supporting warrant, defendant must establish contention by preponderance of evidence); *United States* v. *Dall*, 608 F.2d 910, 914, 915 (1st Cir. 1979) (defendant has burden on motion to suppress of proving his fourth amendment rights violated and that he had legitimate expectation of privacy), *cert. denied*, 445 U.S. 918 (1980); *United States* v. *Evans*, 572 F.2d 455, 486 (5th Cir.) (in hearing on illegality of seizure of records, burden on movant to make specific factual allegations of illegality, to produce evidence, and to persuade court evidence should be suppressed), *cert. denied*, 439 U.S. 870 (1978). Since his evidence is legally in-

sufficient to establish the existence of an agreement made by the prosecutor, we dismiss Price's argument that the prosecutor did not keep it.

As we have noted, Price's testimony before the grand jury was not used in the Government's case-in-chief; Price claims only that it was "undoubtedly used to refresh the recollection of Ciulla," after which Ciulla explained his activities in Las Vegas more fully. This testimony is said to have been the basis on which Price was indicted. Price, however, offered no evidence that his testimony was, in fact, used to refresh Ciulla's memory. In contrast, the Assistant United States Attorney testified specifically that he never communicated directly or indirectly to Ciulla the contents or substance of Price's grand jury testimony, and had no knowledge of any agents investigating the case doing so. In view of Price's inability to establish that Ciulla even learned of his grand jury testimony, we find his claim of prosecutorial misconduct tenuous indeed.

Goldenberg's Claim of Error for Permitting Use of Wiretap on Cross-Examination.

To understand Goldenberg's argument on this issue, its factual background must be outlined. A telephone conversation to which Goldenberg was a party was intercepted under authorization of the United States District Court for the District of Rhode Island. It is not clear whether Goldenberg was provided with an inventory of the intercept pursuant to 18 U.S.C. § 2518(8)(d)[62]: the Government claims that one was sent to him; he claims that he did not receive it because it was sent to the wrong address.

Prior to trial, Goldenberg moved that the Government be ordered to affirm or deny the existence of any intercepts, and

[62] Under *United States* v. *Harrigan*, 557 F.2d 879, 884 (1st Cir. 1977), Goldenbeg must show actual incurable prejudice arising from a violation of this section of the statute in order to have an intercept suppressed. No such showing has been made.

if affirmed, that the Government be ordered to divulge their contents. The motion also asked that the Government affirm or deny whether such intercepts originated in proceedings relating to the indictment and whether or not the Government intended to offer the intercepts in its case-in-chief, cross-examination, or rebuttal. The magistrate denied the motion "except to the extent that the attorney for the Government shall simply state, if he has not done so already whether or not he is aware of any such electronic surveillance?" The Government replied by stating that no such surveillance would be used in the case-in-chief. Goldenberg then requested a copy of any intercept that the Government intended to use other than in the case-in-chief. The Government did not respond.

During the trial, but before he started to testify, Goldenberg made an anticipatory objection to the use of the interceptions on the ground that the Government had failed to comply with 18 U.S.C. §§ 2517 and 2518(5) and (8)(b) (claims not pressed on appeal), and that no order from the district court authorizing the wiretap had been obtained. At the start of the cross-examination of Goldenberg there was a lengthy bench conference concerning the use of the intercepts. Goldenberg claimed that using them for any purpose was prohibited by 18 U.S.C. § 2518(9),[68] because he had not been furnished "with a copy of the court order and accompanying application, under which the interception was authorized and approved" at least 10 days prior to trial. In

[68] Under 18 U.S.C. § 2518(9):

> (9) The contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved. This ten-day period may be waived by the judge if he finds that it was not possible to furnish the party with the above information ten days before the trial, hearing, or proceeding and that the party will not be prejudiced by the delay in receiving such information.

reply, the Government stated that it had a transcript of a conversation between Goldenberg and a Rhode Island bookmaker intercepted in Rhode Island. During this conversation, the two exchanged betting information. Because Goldenberg had stated emphatically on direct examination that he had had nothing to do with illegal bookmaking, the Government attorney stated that he intended "to cross-examine him, not introduce the tape in evidence, but cross-examine him as to the fact he had such a conversation. If he continues to deny it, then, on rebuttal the Government will introduce the wiretap." The cross-examination was allowed; Goldenberg admitted that he had had such a conversation, but denied knowing that the person was a bookmaker. On redirect examination, Goldenberg's attorney put the transcript of the intercept in evidence.

The main thrust of Goldenberg's argument on appeal is that any questioning about the intercepted conversation was improper because of the Government's failure to comply with 18 U.S.C. § 2518(9). As noted, this section specifically provides that "the contents of any wire or oral communication intercepted pursuant to this chapter or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial" unless each party has been furnished with a copy of the court order and accompanying application under which the authorization was approved, not less than 10 days before trial. 18 U.S.C. § 2518(9). The judge may waive this requirement if notice could not be given and the party was not prejudiced by the delay. *Id.* The Government does not claim that it fulfilled this statutory requirement.

The 10-day notice period provided by § 2518(9) is designed to give an aggrieved party such as Goldenberg the opportunity to make a motion to suppress. S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S. Code Cong. & Ad. News 2112, 2195 (discussing original §§ 2518(9) and (10)(a), which are virtually identical to successor sections in effect at time of trial.) Although Goldenberg claims he suffered "ex-

treme prejudice" from not receiving the statutory notice, he has not pointed out what that prejudice was, and we can perceive none. Goldenberg clearly knew the sort of information that the Government had, that it stemmed from a Rhode Island wiretap made in the course of an ongoing investigation, that the district court in Rhode Island had impounded the relevant documents, and that the Government intended to use the intercepted conversation for purposes of impeachment if Goldenberg's testimony on direct examination made such a inquiry relevant. Yet Goldenberg made no explicit motion to suppress the intercepted testimony under the statute. Moreover, the judge's permitting the evidence to be used for cross-examination could be viewed as an implicit waiver of the 10-day notice requirement. *See Furtado* v. *Bishop*, 604 F.2d 80 (1st Cir. 1979), *cert. denied*, 444 U.S. 1035 (1980). Until Goldenberg's testimony, the intercept was not even arguably relevant; the legislative history specifically states that even a motion to suppress, if filed, is not a bill of discovery for the defendant. *Id.* at 2196. We believe that any technical violation of 18 U.S.C. § 2518(9) did not prejudice Goldenberg in any way.

In any event, the interception, even if not legally authorized, could be used for impeachment purposes. It is now firmly established that illegally obtained evidence may be used to impeach a defendant on cross-examination. *See United States* v. *Havens*, 446 U.S. 620, 627-28 (1980); *Oregon* v. *Hass*, 420 U.S. 714, 717-18 (1975); *Harris* v. *New York*, 347 U.S. 62, 65 (1971); *Walder* v. *United States*, 347 U.S. 62, 65 (1954).

Moreover, our reading of the transcript of the intercept shows that it was ambiguous at best: it could have been interpreted either as corroborative or contradictory of Goldenberg's testimony or as being of no consequence.

We also reject Goldenberg's claim that he was prejudiced by the Government's failure to reveal this same information in response to the magistrate's pretrial order that evidence of bad acts which the Government intended to use in its *case-in-*

chief be disclosed to Goldenberg in camera. The order was not evaded; the only evidence of bad acts came from the intercept which, as already discussed, was used only for impeachment on cross-examination.

The Post-Trial Motions for a New Trial.

Unfortunately the end of the trial did not silence Ciulla. Within three days of the verdict, the Boston Globe had interviewed him and published an article based on that interview. Appellants all brought motions for a new trial, to which the newspaper article was attached, alleging that Ciulla had perjured himself at the trial; appellants requested an evidentiary hearing on the motions. The district court, after hearing extensive arguments including a detailed offer of proof, denied the motions without an evidentiary hearing. Appellants claim that they were entitled to an evidentiary hearing on the new trial motions.

We think it clear that the standard for review is abuse of discretion. *United States* v. *Zannino*, 468 F.2d 1299, 1303 (1st Cir. 1972), *cert. denied*, 410 U.S. 954 (1973). Even if, however, we were to accept appellants' argument that somehow the requirements of 28 U.S.C. 2255 applied, an evidentiary hearing would not be mandated.

> [I]f the claim is based upon facts with which the trial court, through review of the record or observation at trial, is familiar, the court may make findings without an additional hearing, and, as is the case for findings of the trial court generally, those findings will not be overturned unless they are clearly erroneous.

United States v. *DiCarlo*, 575 F.2d 952, 954-55 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978).

The district court had just finished a forty-six day jury trial at which Ciulla was the principal witness. It had the newspaper article before it. An evidentiary hearing would not have increased the court's grasp of the facts and the issues.

We have read the article and, based on what is by now an intimate knowledge of the transcript, agree with the Government that it does not show or tend to show that Ciulla lied on the witness stand. At best it would have minimal impeachment value. It was neither an abuse of discretion nor clearly erroneous for the district court to deny the motions for a new trial without an evidentiary hearing.

CONCLUSION

We have considered all of the other objections raised by appellants and do not feel that they merit discussion. "A defendant is entitled to a fair trial but not a perfect one." *Lutwak* v. *United States*, 344 U.S. 604, 619 (1953).

The convictions of Howard T. Winter, James Martorano, Melvin Goldenberg, and Elliot Paul Price are affirmed.

The convictions of James DeMetri and Charles DeMetri are reversed.

Appendix I-B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1441

UNITED STATES OF AMERICA,
Appellee,

v.

ELLIOT PAUL PRICE,
Defendant-Appellant.

No. 79-1438

UNITED STATES OF AMERICA,
Appellee,

v.

MELVIN GOLDENBERG,
Defendant-Appellant.

Before
ALDRICH, CAMPBELL AND BOWNES, *Circuit Judges.*

ORDER OF COURT

Entered November 25, 1981

The petitions for rehearing are denied. The petitioners have, and with some reason, misunderstood a portion of our

Petrozziello comments. In order to clarify our *Petrozziello* ruling, the following change should be made in the opinion. On page 38 of the slip opinion, the last two sentences of the paragraph ending on that page are stricken, but not the footnote. The following is to be inserted in their place.

> Moreover, we believe that in the context of this case, the judge implicitly made such a finding by permitting the conspiracy charge to go to the jury.[30] In light of the judge's understanding of the *Petrozziello* standard, and his instructions to the jury, it is apparent that he would not have permitted the jury to consider the hearsay evidence if he had changed his mind and come to the conclusion that a preponderance of the evidence no longer supported the finding of a conspiracy. While the district courts will of course now follow the rule enunciated in *Ciampaglia*, we cannot, for the reasons stated, say that there was any reversible error in the procedure followed here.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Cullen, Goldings, Smith, Egbert and Mss. Baker and Felton.]

Appendix I-C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 79-1441

UNITED STATES OF AMERICA,
Appellee,

v.

ELLIOT PAUL PRICE,
Defendant-Appellant.

No. 79-1438

UNITED STATES OF AMERICA,
Appellee,

v.

MELVIN GOLDENBERG,
Defendant-Appellant.

Before COFFIN, *Chief Judge*, and ALDRICH, CAMPBELL, BOWNES and BREYER, *Circuit Judges*.

ORDER OF COURT

Entered November 25, 1981

The application for rehearing en banc is hereby denied.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Cullen, Goldings, Smith, Egbert and Mss. Baker and Felton.]

APPENDIX II-A

United States Court of Appeals
For the First Circuit

No. 80-1831

UNITED STATES OF AMERICA,
APPELLEE,
v.
JAMES MARTORANO,
DEFENDANT-APPELLANT.

No. 80-1832

UNITED STATES OF AMERICA,
APPELLEE,
v.
CHARLES DEMETRI & JAMES DEMETRI,
DEFENDANTS-APPELLANTS,

No. 80-1833

UNITED STATES OF AMERICA,
APPELLEE,
v.
HOWARD T. WINTER,
DEFENDANT-APPELLANT.

No. 80-1834

UNITED STATES OF AMERICA,
APPELLEE,
v.
ELLIOT PAUL PRICE,
DEFENDANT-APPELLANT.

No. 80-1846

UNITED STATES OF AMERICA,
APPELLEE,
v.
MELVIN GOLDENBERG,
DEFENDANT-APPELLANT.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. A. DAVID MAZZONE, *U.S. District Judge*]

Before
CAMPBELL, BOWNES and BREYER, *Circuit Judges.*

Albert F. Cullen, Jr. and *Richard Egbert*, with whom *Cullen & Wall* was on brief, for appellants Howard T. Winter and James Martorano.

Jeffrey M. Smith, Joseph Travaline, and *Morris M. Goldings*, with whom *Paul T. Smith, Harvey R. Peters, Barry Haight, Hawkes & Goldings, Jeanne Baker*, and *Baker & Fine* were on brief, for appellants Charles Demetri & James Demetri, Elliot Paul Price, and Melvin Goldenberg.

Robert M. Waller, Special Attorney, Department of Justice, with whom *Edward F. Harrington*, United States Attorney ~~was~~ on brief, for appellee.

and Jeremiah T. O'Sullivan Special Attorney, Department of Justice

October 30, 1981

BOWNES, *Circuit Judge.* After conviction and sentencing, appellants brought motions for a new trial and an evidentiary hearing thereon based on the alleged suppression of exculpatory material and the discovery of new evidence. These motions have an entirely different basis than did those whose denial we affirmed in cases Nos. 79-1437, 1438, 1441, 1442, 1446 and 1476. The motions now before us, brought pursuant to Federal Rule of Criminal Procedure 33, were filed between August and October of 1980. Oral argument was heard by the district court on November 17 and on December 12, 1980, it issued a written memorandum and order denying appellants an evidentiary hearing and their motions for a new trial.

The evidence which appellants claim entitled them to a new trial can best be considered by separating it into four segments. The "Detroit Information" consists of several FBI reports of interviews with Anthony Ciulla conducted in 1976, 1977 and 1978 relative to race fixing in the Detroit, Michigan,

area and Ciulla's grand jury testimony in Detroit on October 7, 1977, on the same subject. The "McCarron" material is based on affidavits by Margaret McCarron which appellants claim shows that Ciulla lied at the trial. The "Owen" evidence purports to prove that Robert Owen, who pled guilty during the trial, told his attorney that Ciulla had told him (Owen) that he (Ciulla) had lied about the role defendants Price and Goldenberg had played in the race fixing schemes. Appellants also make a "*Mesarosh*" claim based on the fact that the strike force attorney assigned to the Eastern District of New York did not use Ciulla as a witness in a race fixing case held in that jurisdiction.

I. The Detroit Information.

The first question is whether this material falls within the compass of *United States* v. *Agurs*, 427 U.S. 97 (1976), and, if so, which of the three *Agurs*' categories applies. We find that all of the Detroit information, the FBI 302's and the grand jury testimony was exculpatory material within the scope of *Agurs*.[1] It involved "the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *Id.* at 103. It seems clear, however, that the first two *Brady*[*] situations, as defined in *Agurs*, do not apply. We reject the appellants' insistent and repeated claims that the Detroit material shows that Ciulla perjured himself and that the Government knew or should have known it. *Id.* at 103. Nor do we think that there was a specific pretrial request for the material. *Id.* at 104. Contrary to appellants' assertions we find no support in the record for the claim that either the magistrate or the district court ordered the material, or any part of it, disclosed to defendants prior to trial.

[1] Although the district court did not specifically cite to *Agurs* in this section of its opinion, it did use the correct *Agurs* test. The Government does not seriously dispute the application of *Agurs*; its argument is directed mainly to materiality.

[*] *Brady* v. *Maryland*, 373 U.S. 83 (1963).

The motions for exculpatory evidence, although lengthy and comprehensive, were not directed to any particular source; they were basically detailed boiler plate requests for any and all exculpatory evidence. We are, therefore, confronted with the general request situation, the third category discussed in *Agurs*. *See United States* v. *DiCarlo*, 575 F.2d 952, 958-60 (1st Cir.), *cert. denied*, 439 U.S. 834 (1978); *United States ex rel. Moore* v. *Brierton*, 560 F.2d 288, 292 (7th Cir. 1977), *cert. denied*, 434 U.S. 1088 (1978). We do not think that the fact that the United States Attorney prosecuting this case asked an attorney on the Detroit Strike Force whether there was any exculpatory material in the Detroit files and received a negative reply avoids the impact of *Agurs*. The prosecutor in charge of this case had a positive duty to review the files himself or have them checked by someone thoroughly familiar with the case. Nor do we think that *Agurs* is avoided because the Detroit grand jury testimony of Ciulla was turned over to the court during the trial for an in camera inspection. The *Brady* motions were made prior to trial and the judge should have been apprised of the existence of the testimony before trial so he could have examined it, if he wished. Although it probably made no difference in this case, there may be cases in which a pretrial in camera inspection of alleged *Brady* material would expedite matters considerably.

We now evaluate the Detroit material in the context of the entire record to determine if the omitted material creates a reasonable doubt that did not otherwise exist. *United States* v. *Agurs*, 427 U.S. at 112; *United States* v. *Imbruglia*, 617 F.2d 1, 5 (1st Cir. 1980).

The 302's

Appellants first contend that Ciulla's statement, made prior to his formal interviews, that he would not provide information about his organized crime connection in the Boston-

New England area is materially exculpatory because it undercuts the Governments theory that Winter was an organized crime figure in the Boston-New England region. According to the FBI preliminary report, Ciulla "would not talk about the Boston La Cosa Nostra (LCN) for three reasons. First, he would be killed if he talked. Secondly, even if placed in Federal protective custody, his family would be exposed to retaliation and thirdly, he was not associated close enough to provide information that would result in convicting any one person." We note that the first two reasons, which imply significant knowledge, contradicts the third, which asserts ignorance. However that may be, the fact is that there was no testimony in the case by Ciulla, or anyone else, that Winter was a member of the organized crime syndicate in New England. Indeed, at defendants' request the district court ruled at the start of the trial that it would not allow "[a]ny reference to mafia, Cosa Nostra, or organized crime by that name." Nor did Ciulla refer to Winter in the Detroit 302's. Although it is conceivable that the jury would infer that only an organized crime figure would retain a person such as Ciulla to fix horse races, we agree with the district court that it was extremely unlikely that the defendants would have tried to impeach Ciulla by showing that Winter was a member of organized crime in the Boston-New England area. And even if they did, Ciulla could have said that he changed his mind since making the statement, which he did, if Winter was in fact, as appellants suggest, an organized crime figure in New England. We find that Ciulla's preliminary statement to the FBI in Detroit falls far short of being material under the applicable *Agurs* standard.

In addition to describing in detail race fixing in the Detroit area, Ciulla also told the FBI that in 1974 his "biggest score" was made at the Pocono Downs racetrack in Wilkes-Barre, Pennsylvania. Appellants contend that the 302 information relative to Pocono Downs contradicts his court testimony about fixing races there. We find no significant contradic-

tions. In the FBI statement Ciulla said he fixed sixty races, one to two a day, during the 1974 racing season. Ciulla's trial testimony focused on only four races: the ninth race on August 12, the sixth race on August 18, the fourth race on August 20 and the third race on September 8. This leaves at least fifty-six other races in which the appellants were not implicated. Ciulla testified that he went to Pocono Downs for two reasons: to try to get Spread The Word into a claiming race, which was not accomplished, and because Robert Owen[2] told him that he could fix as many races a day as he wanted. When Ciulla called Winter to tell him that the ninth race was fixed, he testified that he also told Winter that he realized that because it was Pocono Downs, the outside betting activity would be limited. It is not inconceivable that Ciulla and Owen decided to keep the winnings for themselves on all but four of the sixty races that were fixed.

Ciulla's 302 statement arguably contradicts his courtroom testimony in only one respect. He told the FBI that three members of the Pittsburgh and Philadelphia mob, Occhipinti, Sciandra and Conancio, financed the Pocono Downs fixing. At the trial Ciulla described this trio as "runners." Although this might have been explored on cross-examination, we note that, according to Ciulla, the DeMetris acted as runners in the race at Garden State on February 8, 1975, in which Spread The Word was entered. It is not implausible that the financiers also acted as runners.

It is important to point out that the Pocono Downs evidence only implicated Winter and Martorano. The DeMetris were not involved at all and the motions of Price and Goldenberg for judgments of acquittal as to Counts Thirty-Seven and Thirty-Nine, interstate travel involving Pocono Downs, were granted. Nothing in the FBI statement contradicts Ciulla's testimony that he called Winter and Martorano after each of the four races was fixed and told them what horse to bet.

[2] Owen pled guilty during the trial.

Nothing in the 302 contradicts Ciulla's testimony that Winter told him to beat up a trainer, Ewalt, for using his bribe money to bet on the fixed race and to beat up a jockey, Gallop, for not holding his horse which finished second in the third race on September 8. We do not think that the statements given to the FBI about Pocono Downs reached the *Agurs'* level of materiality.

Price and Goldenberg argue strenuously that the 302's and the grand jury testimony show that Ciulla had Las Vegas contacts through the people who were financing the Detroit fixing and, therefore, Price and Goldenberg were not needed for outside betting as he testified at trial. But neither the 302's nor the grand jury testimony show that Ciulla himself knew individuals in Las Vegas who would play the role that he testified Price and Goldenberg did in placing bets on fixed races with bookies throughout the country. Before the Detroit grand jury, Ciulla testified that his financiers were Niki Russo, Anthony Tassone and his son, Jimmy Tassone. He told the grand jury that they were the ones who would take care of the extensive outside betting in Las Vegas. This does not show that Ciulla himself had the Las Vegas contacts. We agree with the district court that the impeachment weight of this evidence was slight. We do not doubt that, in the words of appellants, "in the hands of skilled counsel at trial, [this would have] opened up a rich vein of detail." But the vein would not have led to the mother lode; it would have petered out to nothing.

Finally and definitely least, we discuss the claim that Ciulla's statements in the 302's and to the grand jury about how he "suckered greedy businessmen" out of "front" money contradicts his cross-examination testimony that he had not been a tout "at any time in this experience." We note first that the testimony is contradictory. Ciulla first denied flatly that he had been a tout, but the last question and answer in this line could be construed as an admission to being one:

Q. Well, you say fixed races. I'm asking you if you were ever a tout?

A. *Apparently*, I fixed races. I've been convicted. (Emphasis added).

In his FBI statement and grand jury testimony, Ciulla explained that he would approach three or four businessmen, tell them he was fixing a race and if they would put a certain amount of money up front, he would give them the winning combinations on the race. The combinations furnished, however, were not the winning ones; Ciulla "suckered" the businessmen out of their "front" money. We think it significant that Ciulla himself never used the word "tout"; that is the FBI description given to this operation. None of the dictionary definitions of "tout" encompasses the deliberate giving of false information about races. We don't know and do not decide whether Ciulla was a "tout." It is abundantly clear that he was a crook, but the jury knew that. We do not think that this additional confirmation of Ciulla's dishonesty would have made any difference in the jury's credibility assessment of his testimony.

We agree with the district court that an evidentiary hearing was not necessary. We shudder to think of how much time these imaginative and ingenious attorneys would have spent mining the "rich vein of detail" dug out from the 302's to no avail.

II. The McCarron Affidavits.

Margaret McCarron gave three affidavits relative to her dealings with Ciulla. Two of them are dated April 24, 1980. The third is dated July 28, 1980, the same date on which all three were turned over to Paul Smith and Barry Haight, attorneys for Price and James DeMetri. They can be summarized as follows.

The First Affidavit.

Sometime within the week prior to December 26, 1978, McCarron tried to contact Ciulla, first through Strike Force Attorney O'Sullivan and then through FBI Agent Thomas Daley. McCarron wanted to interview Ciulla because she planned to write a book about him in collaboration with a Dale Austin. Ciulla called McCarron on December 26 and discussed the book; Ciulla told her that he was interested in getting money for himself. From then on Ciulla called McCarron frequently. At times, he appeared to be drunk and calling from bars or nightclubs.

McCarron met with Ciulla and his wife, Helen, in Portland, Oregon.[3] They discussed the writing of a book. Ciulla told McCarron that he wanted to reserve the movie and television rights but he would go along with her if she gave him [$25,000]. She gave him $2,000 in cash and got a receipt for it. McCarron had understood from previous telephone conversations with Ciulla that she was to have the movie and television rights. Ciulla, however, struck from a proposed contract her rights to movie and television earnings. She then called Agent Daley who said he was washing his hands of the matter.

Ciulla called McCarron many times after that. At least once he told her he was looking out for himself and intended to make a million dollars out of the movie and television rights. He told her that she was "out" from the first day. He also told her that there were some people against whom he had a personal vendetta and that he was going to accuse them of various crimes. We quote the rest of the affidavit.

> He told me that he had lied during the trial of the case in Boston involving Elliot Price and other defendants and that he had brought the Las Vegas people into this case

[3] No date is given in the affidavit, but it seems agreed that this happened after Ciulla testified, but before the trial ended.

because he had been down to Las Vegas and had become drunk and disorderly and that he had lost a lot of money gambling and when he went to get additional credit, he was turned down and that this was the reason why he felt that he would rather bring those people into the case than others to whom he felt a personal loyalty. "My creditability is the most important thing to me because when I get out of this F— program I am going to get my money for my story. It is my story and I'll lie whenever I feel like it," is what he said to me.

The Second Affidavit.

Ciulla told McCarron over the phone on various occasions that he had to say what the Government people told him to say. He also told her that he and Agent Daley were close personal friends. The affidavit ends with this sentence: "Ciulla told us that Daley and the Justice Department told him what to say in the trial of the case."

The Third Affidavit.

This affidavit is mainly a recital of McCarron's unsuccessful attempts to enter into a contract with Ciulla for writing and publishing a book. She describes her contacts with Dale Austin whom she expected to help her write the book. Austin lost interest early and withdrew from the venture. McCarron then talked to an agent in New York, Sterling Lord, who told her she needed more material. Gerald R. Strine, Editor of the Horseman's Journal, told her that if she would introduce him to Ciulla so that he could get enough information for an outline, there would be an instant advance. She immediately called Ciulla and told him to contact Strine, which he did. Strine interviewed Ciulla for ninety minutes and wrote a three-chapter outline which was submitted to a literary agent, Milton Fenster. Fenster, in turn, submitted the outline to Bantam Books and Columbia Pictures with an asking price of $500,000. After some negotiations, both Ban-

tam and Columbia turned the deal down. Ciulla told McCarron in early June that he had told Strine to stop trying to sell the property; he was going to sit on it until the New York indictments were handed down. McCarron flew to New York in July to talk to Fenster personally. She told Fenster that "I had been spending my money right and left" and wanted to hear from him why the deal with Columbia Pictures had fallen through. Strine and Fenster then got into a "battle" over the rights to the book (which was still nonexistent). Fenster approached five different movie companies and Mike Wallace of Sixty Minutes, but to no avail. According to McCarron, "[a]ll of the business dealings that I have just put on paper took place during the trial in Boston."

The Counter-Affidavits.

Thomas Daley executed an affidavit on October 10, 1980. He stated that McCarron contacted him in late December, 1978, and requested an interview with both him and Ciulla. He informed her that he could not be interviewed without permission from FBI headquarters and not until the case was fully over in the courts. He said that he would pass on her request to interview Ciulla to the witness protection program. Daley denied any knowledge of McCarron's intention to write a book about Ciulla; she had told him that she was thinking of writing a book about horse racing. Daley stated that he never told Ciulla what to say in his testimony "other than to tell the truth about the other defendants." Daley's affidavit further states that his relationship with Ciulla was only that of the normal agent-witness one, that Ciulla never discussed any book or movie and television rights with him and that he was not aware of any negotiations between Ciulla and McCarron.

Ciulla's affidavit was executed on November 5, 1980. He admitted talking to McCarron several times about her ideas for a book, but stated that he never gave her permission to represent him. On the occasions that he called McCarron, he

was not intoxicated. Ciulla admitted receiving $2,000 from McCarron in Portland, Oregon, but stated that he had met with her because she said she would give him $25,000 for a six months option for the right to write and publish a book on his race fixing activities. He gave her six months to raise the additional $23,000 and find a publisher. Ciulla denied that he ever told her he needed convictions to bolster his credibility for a book. He denied telling her that his trial testimony was not true or that he falsely accused anyone of a crime because of a personal vendetta. Ciulla stated that he never told McCarron that the Government was telling him what to testify to during the trial and that "at no time during the trial in Massachusetts did I lie or testify falsely."

McCarron filed a further affidavit dated November 13, 1980, in which she said that during her first conversation with Daley, she told him specifically that she intended to do a book about Ciulla. She further stated that prior to the end of the trial, she told Daley that she gave Ciulla $2,000 in Oregon and wanted it back and Daley told her to contact Ciulla through the United States Marshal's office in Boston.

Ciulla's "Book" Testimony.

During cross-examination, Ciulla admitted that he had been approached about writing a book, but stated that he hadn't dealt with anyone relative to ghost writing or collaborating with him. He agreed that he hoped to write a book. Earlier he had stated that he hoped he would earn some money after he finished testifying. Ciulla denied that he was waiting to negotiate about a book until convictions were returned in the case. He testified that he spoke to a writer from Roper magazine over the phone about a book, but no figures were mentioned.

We agree with the district court that *Agurs* does not apply to the McCarron affidavits. Accepting McCarron's affidavits at face value, this was new evidence of which the Govern-

ment had no knowledge prior to the time Ciulla testified and certainly not prior to trial. *See United States* v. *Agurs*, 427 U.S. at 111. The standard of review is abuse of discretion. *United States* v. *Wright*, 625 F. 2d 1017 (1st Cir. 1980).

> A motion for new trial on the basis of newly discovered evidence will ordinarily not be granted unless the moving party can demonstrate that: (1) the evidence was unknown or unavailable to the defendant at the time of trial; (2) failure to learn of the evidence was not due to lack of diligence by the defendant; (3) the evidence is material, and not merely cumulative or impeaching; and (4) it will probably result in an acquittal upon retrial of the defendant.

Id. at 1019.

We do not think the district court abused its discretion in finding that the evidence was merely impeaching and that it would not have affected the verdict. Nor do we think that an evidentiary hearing was either necessary or desirable. Such a hearing would essentially have been a swearing contest with McCarron pitted against Ciulla and Daley. There probably would be side excursions involving the others who, along with McCarron, saw in Ciulla a golden opportunity to pander to the public's thirst for an inside view of crime. There is no "smoking gun" evidence or anything approaching it, only the statements of a disappointed opportunist who was bilked out of $2,000 by one whom she knew was a self-confessed briber, cheat and crook. As we already have noted, the jury was well aware of Ciulla's character and way of life. This was not the straw that would have broken the camel's back; it was just more chaff to scatter in the wind.

III. The Owen Claim.

Robert Owen was a defendant at the start of the trial. He pled guilty before the trial was over. Ciulla's testimony portrayed him as a willing and eager accomplice who knew to

whom bribe money could be successfully paid. On August 25, 1980, Attorney Paul T. Smith, counsel for defendant Price, executed an affidavit based on three telephone conversations with Owen and a personal meeting with him at the Federal Penitentiary in Allentown, Pennsylvania, on July 22, 1980. In essence, the affidavit states that Owen told Attorney Smith that Ciulla had lied about defendants Price and Goldenberg; that they were innocent. According to the affidavit, Owen told FBI Agent Flaherty, his own attorney, Brian J. McMenimen and Neil Jon Firetog, United States Strike Force Attorney assigned to the Eastern District of New York, that Ciulla had lied about Price's involvement in the race fixing scheme.

Owen executed an affidavit on September 25, 1980, that denied point-by-point the statements attributed to him by Attorney Smith. Agent Flaherty executed an affidavit on November 6, 1980, in which he denied that Owen had told him that Ciulla had lied about Price. In an affidavit dated October 30, 1980, Attorney Firetog completely refuted the statements in the Smith affidavit that Owen had told him that Ciulla had lied about Price and Goldenberg. Firetog also stated that at no time did Owen say that Price and Goldenberg were innocent. Firetog's statement also contradicted Owen's purported statements to Attorney Smith relative to a jockey by the name of Jose Amy. Statements in the Smith affidavit involving alleged conversations between Owen and FBI Agent Martin Conley were denied in an affidavit executed by Conley in October of 1980.

As did the district court, we find it somewhat strange that Owen waited for a year after the trial to try and rescue Price and Goldenberg from Ciulla's alleged perjury. He had two opportunities for baring his breast, when he pleaded guilty and at sentencing. In the light of Owen's affidavit, which is a direct counterpoint to the statements contained in Attorney Smith's affidavit, we see no point in an evidentiary hearing. Under the abuse of discretion test as set forth in *United*

States v. *Wright*, 625 F.2d 1017, already fully discussed, there is no basis for setting aside the district court's denial of appellants' motions for a new trial.

IV. The Mesarosh Claim.

This is yet another variation on appellants' main theme; Ciulla was lying and the Government knew it. Appellants' attempt to bring this case within the holding of *Mesarosh* v. *United States*, 352 U.S. 1 (1956), falls far short of the mark. In *Mesarosh* the Solicitor General of the United States moved to remand the case to the trial court because of untruthful testimony given before other tribunals by a Government witness. *Id.* at 3. We do not think that the failure of the United States Attorney in the Eastern District of New York to use Ciulla in a race fixing trial amounts to an admission that the Government knew that Ciulla lied in this case. We would so find even if the New York prosecutor had not filed an affidavit stating, *inter alia*, "I considered using Ciulla as a rebuttal witness, but his testimony proved unnecessary."

Considering his background and way of life, it can always be argued that Ciulla's testimony, or parts of it, was suspect. Under our system of justice, however, the jury determines the credibility of the witness. As we have already noted, Ciulla was subjected to lengthy, intense and skilled cross-examination. Based on the record, we cannot fault the jury's acceptance of Ciulla's testimony. None of the new evidence, either singly or in combination, is sufficiently material to warrant a new trial.

The order of the district court denying appellants' motion for a new trial and an evidentiary hearing thereon is affirmed.

Appendix II-B

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 80-1833.

UNITED STATES OF AMERICA,
Appellee,

v.

HOWARD T. WINTER,
Defendant, Appellant.

No. 80-1834

UNITED STATES OF AMERICA,
Appellee,

v.

ELLIOT PAUL PRICE,
Defendant, Appellant.

No. 80-1846.

UNITED STATES OF AMERICA,
Appellee,

v.

MELVIN GOLDENBERG,
Defendant, Appellant.

Before COFFIN, *Chief Judge*, and
CAMPBELL, BOWNES and BREYER, *Circuit Judges*.

ORDER OF COURT

Entered November 25, 1981.

The petitions for rehearing and the application for rehearing en banc are hereby denied.

By the Court:
/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Cullen, Goldings, Smith, Egbert, and Mss. Baker and Felton.]

Appendix III

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Criminal Action
DOCKET ENTRY No. 79-42-MA

UNITED STATES OF AMERICA,
Plaintiff

v.

HOWARD T. WINTER,
JAMES MARTORANO,
ELLIOTT PAUL PRICE,
MELVIN GOLDENBERG,
CHARLES DeMETRI and
JAMES DeMETRI,
Defendants

MEMORANDUM AND ORDER
ON
DEFENDANTS' MOTION FOR NEW TRIAL

Mazzone, D.J. December 12, 1980

The defendants, Howard T. Winter, James Martorano, Elliott Paul Price, Melvin Goldenberg, Charles DeMetri and James DeMetri have filed motions for a new trial. They were convicted of a conspiracy to engage in the fixing of horse races at various tracks located in Pennsylvania, Rhode Island, New Jersey, New Hampshire and Massachusetts. They were also convicted of various counts charging sports bribery and interstate travel to effect the fixing of the races.

The main witness for the prosecution was Anthony Ciulla. He implicated these defendants in the scheme by his direct testimony, which was then corroborated as to each of the defendants in varying degrees by telephone toll records, hotel records, race charts and other witnesses.[1]

The grounds alleged as the basis for the motions for new trial are essentially the same as to each defendant, namely that the government engaged in improper conduct by allowing Ciulla to testify falsely and by failing to provide exculpatory material to the defendants. Specifically, the defendants allege the government allowed Ciulla to testify falsely about (1) his connection with the Las Vegas defendants; (2) his association with Boston organized crime figures; (3) his need for financial backing from Winter; and (4) his deal for a book about his race-fixing activities. The material supporting these changes was set out in affidavits and various interview reports (302's) which became available to the defendants after the trial.

After review of the affidavits, submissions, memoranda of parties and the trial records, I conclude the defendants are not entitled to an evidentiary hearing and are not entitled to a new trial.

My denial of an evidentiary hearing is based on my conclusion that the motion can be decided properly on the affidavits and the trial record. Given the completeness of the affidavits and the extensive trial record, an evidentiary hearing is not likely to reveal undisclosed facts. Almost all of the witnesses to be offered by the defendant, Price, have submitted complete affidavits and even responding affidavits. We cannot see that the situation as presented in the affidavits would be sufficient-

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[1] The indictment charged 21 defendants at the outset. The charges were dismissed against two; seven pleaded guilty to various charges, not the conspiracy; one was acquitted; one who was convicted of all charges did not appeal; and four are presently fugitives.

ly altered by an evidentiary hearing. *Johnson* v. *United States*, 327 U.S. 106 (1945).

My denial of a new trial is based on my findings that there was no government misconduct and that the information now available was not exculpatory material within the meaning of *United States* v. *Agurs*, 427 U.S. 97 (1976). Because the defendants have alleged prosecutorial non-disclosure in response to a defense request for specific information, the standard used in evaluating the instant motions is whether "the suppressed evidence might have affected the outcome of the trial." *Id.* at 104. *United States* v. *Wright*, 625 F.2d 1017 (1st Cir. 1980); *United States* v. *Imbruglia*, 617 F.2d 1 (1st Cir.1980).

For the purposes of this memorandum, the defendants' allegations are grouped into three categories.

1. *Ciulla's Deal to Write a Book*

In summary, affidavits submitted by Price state that Ciulla was first contacted by McCarron, through F.B.I Agent Daley, about writing a book in 1978, and that negotiations continued during the early part of 1979. Ciulla was paid $2000 as part of the deal which eventually fell through. In order to establish his credibility and to increase future sales, Ciulla wanted to insure that the people he accused were convicted. He falsely named certain Las Vegas defendants as participants in this scheme because they had denied him credit to gamble. Finally, he testified as the government wished him to testify.

The defendants claim this information directly contradicts Ciulla's trial testimony that no book was in the works. It further provided a special and continuing motive to lie and was direct acknowledgment that Ciulla committed perjury with respect to the Las Vegas defendants. The information had it been known at the time of trial would have provided the defendants with valuable factual ammunition to further discredit Ciulla's testimony.

The government responds by submitting affidavits which, in summary, state that Agent Daley's only contact with the prospective co-author was a general request for an interview and that he had no knowledge of any deal. The $2000 was actually paid after Ciulla testified. Further, Ciulla specifically denies each of the allegations in his affidavit and Daley denies that he "coached" Ciulla.

This information was further impeachment material for the defense, and, as such, is insufficient for the purposes of a motion for new trial under the circumstances of this case. *Pelegrina* v. *United States*, 601 F.2d 1821 (1st Cir. 1979). Over a period of days of intensive cross-examination, there were repeated references to Ciulla's intention to write a book, or otherwise profit from his testimony as an informer. He had admitted speaking to reporters six months before the trial and had admitted that he received a substantial sum from Sports Illustrated magazine. Under these circumstances, the jury already knew that he had profited monetarily from his status and that he intended to profit further. There is very little likelihood that further impeachment on this score would have affected the verdict.

Moreover, the McCarron affidavit is both tardy and inaccurate in one glaring respect. It can be subjected to legitimate questioning when the author comes forward over a year after a well publicized trial with her assertions that Ciulla lied at the trial. Her relationship with Ciulla began in December, 1978, months before the trial began and continued until after the trial. The affidavit further appears to be clearly inaccurate when the author claims to have told Agent Daley that she gave Ciulla $2000 *prior to* trial. The documentary material submitted by the government shows clearly that the $2000 was paid *after* the trial.

2. *The Government's Failure to Provide the Detroit Information.*

In response to defendants' requests for the Detroit "information," the government provided the court with a transcript of

Ciulla's testimony before the Detroit grand jury. The Court reviewed the transcript *in camera*, released it to Owens,[8] who was mentioned in it, and denied it to the others, ruling that the material was not exculpatory. The transcript was marked and sealed for the purposes of appeal. The Court was not provided with any "302's." The grand jury transcript contains basically all of the information in the "302's" but the "302's" contain additional information.

The "302's" furnished certain information which can be summarized as follows. In 1973, Ciulla was in Detroit fixing horse races with another group, including Owens. Detroit race tracks were on the Las Vegas board and it was possible to bet large amounts. Ciulla visited Las Vegas and placed a bet with the head bellman at Caesar's Palace. He sent an accomplice to Las Vegas to check the tracks to bet. As part of that scheme, Ciulla was "touting" races to gullible businessmen in connection with the Detroit operation. He had been responsible for killing several horses by giving them overdoses of drugs. He claimed he was represented by a certain prominent lawyer in Rhode Island, a claim disbelieved by the Rhode Island police. He also scored heavily in a scheme at Pocono Downs in Pennsylvania in 1974 using funds supplied by a different group. There was information that he sought to cooperate in New Jersey as early as January, 1975. Finally, Ciulla said in January, 1976, that he was not close enough to Boston organized crime or to the Boston La Cosa Nostra to provide information that would result in convicting any one person.

The defendants claim that this information would have allowed them to show that Ciulla was lying because (1) he already had a Las Vegas connection, and, therefore, did not need the Winter connection in Las Vegas to place bets there; (2) Winter did not finance the Pocono Downs operation;

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[8] Owens was on trial until the final stages when he pleaded guilty.

(3) Winter was a "reputed" member of organized crime in the Boston area; (4) he said he began making a deal to cooperate in December, 1976; and (5) he was a "tout" that used the DeMetri brother as "suckers." It would also have allowed them to show Ciulla was guilty of prior crimes or bad acts, and that the police in Rhode Island did not regard him as a credible witness.

This aspect of the defendants' challenge is the most troublesome. We do not engage in *post hoc* reationalization, but it is necessary to place the entire case in perspective in order to fully understand the issues involved. This case involved one of several race-fixing schemes operating at the same time. Ciulla told the jury that he was part of other schemes and that he had been fixing races in Detroit, a wholy unrelated operation, before he met Winter. He also testified of his involvement with other accomplices in Pennsylvania, even to the point where he was observed by Pennsylvania law enforcement officers transferring large sums of money to members of another group at a Pennsylvania airport. Ciulla made no secret of his prowess at fixing races in many locations, even on the same day. He acknowledged that Winter had nothing to do with Detroit, but said he kept in touch with Winter because they were negotiating.

The Las Vegas "connection" that was described in the "302's" was not extensive and was not detailed. There was one isolated bet. There was no intimation that this connection was as sound and pre-arranged as the one Ciulla described in the present scheme and which he testified arose out of the fact that Price and Goldenberg were formerly from Boston and old friends of Winter.

Any further development of the statement that Ciulla was not close to the Boston La Cosa Nostra or organized crime would have injected a dangerous and collateral note into the proceedings. If Winter were to have used this information, it

would have required, at least, that the jury be told he was "reputed" to be an organized crime figure. If the other defendants were to have used the information, they would presumably have accused Winter of the same "reputation," no matter how undeserved. Either way, its use as impeaching material was extremely debatable. It should also be noted that La Cosa Nostra and organized crime were both terms used interchangeably by Ciulla. What he meant when he used either term is speculative and would not have led to fruitful inquiry, either by the defendants or by the government.

Ciulla's admitted participation in brutal and violent episodes was amply explored by all counsel in the jury's presence. His callous attitude toward the animals was described fully and vividly. He admitted that he had been drugging horses and had been convicted for doing so.

As far as the claim that Ciulla was lying when he said he was not a "tout," we believe this description, when used in the context of this case, was a distinction without a difference. The jury had ample evidence of the DeMetri involvement through the toll records, the several meetings at the DeMetri place of business, with other members of the group present, as well as the use of the DeMetri private property. An argument centered on Ciulla's denial that he was a "tout" is not impressive when one considers that he had been fixing races for 15-20 years.

In a case in which cross-examination alone covered the better part of 9 days and inquiry was permitted into details of his past, present and future life, we cannot say that presenting any of the above information to this jury might have led to a different result.

3. *The Government Knew Ciulla Had Testified Falsely.*

The basis of this claim is material furnished in connection with the New York race-fixing prosecution. The claim alleges that Ciulla was not called as a witness in the New York trial

because the government knew he was not telling the truth. Ciulla, when confronted with a jockey and accused of lying, did not deny it. Robert Owens, a co-defendant in this case, told his lawyer and the lawyer for Price that Ciulla had admitted to him that he was lying about the Las Vegas defendants. Owens further told the agents that Ciulla admitted to him that he had lied.

The defendants say that this information clearly demonstrated that the government had become convinced that Ciulla was lying and, therefore, pulled him out of the New York trial. They further claim that the government failed to carry out its continuing duty to disclose evidence of Ciulla's perjury. The last allegation is that this material showed Ciulla's willingness to lie about people he believed were fixing races in order to effect his own brand of justice and that the government knew that he was lying and tolerated it.

The government's response by way of affidavits specifically denies all of the operative facts surrounding various alleged confrontations and further states that the decision not to use Ciulla as a witness was a tactical one based on an analysis that his testimony was not necessary. The government personnel involved to one degree or another in the New York prosecution submitted affidavits specifically denying each of the allegations made.

Finally, there is the Owens matter. We do not regard lightly the affidavits of prominent and respected counsel, but Owens submitted his own affidavit and denies the material and critical facts at issue. We are also constrained to say that Owens participated vigorously in this lengthy trial, and pleaded guilty only as the trial was ending. Nothing was forthcoming from him directly or indirectly for more than a year after the trial was completed. We cannot say that this was information that was unknown or unavailable to the defendants.

Taken as a whole, this last category also fails to provide a sufficient basis for a new trial. The decision not to use Ciulla was a tactical one. By that time, Ciulla had testified at other trials and had certainly undergone thorough cross-examination in each one. It is certainly understandable that the prosecutor could made a sound tactical decision not to use Ciulla if he felt his testimony were not needed.

Summary.

In summary, then, these challenges boil down to the claim that Anthony Ciulla provided known false testimony and that the government withheld information that was material to the defense. Since we have found no deliberate deception by the presentation of known false evidence, the line of cases beginning with *Mooney* v. *Holohan*, 294 U.S. 103 (1955) are not applicable here. *Mesarosh* v. *United States*, 352 U.S. 1 (1956); *Napue* v. *Illinois*, 360 U.S. 264 (1959); *Giglio* v. *United States*, 405 U.S. 150 (1977).

As for Ciulla's credibility, it could be argued that this further information, carefully developed by skilled lawyers, would have been the clinching proof that Ciulla was not worthy of belief. But viewed in the totality of the circumstances of the trial proceedings and the trial record, that argument fails. During the proceedings, at least nine defense lawyers, all experienced and skilled at cross-examination, subjected Ciulla to a thorough, grueling and effective cross-examination. Ciulla's testimony was strongly corroborated by toll records, hotel records, and other witnesses. Where corroboration was not the strongest, as in the case of Price, Price took the stand in his own defense and specifically and categorically denied each and every allegation of his complicity made by Ciulla. Thus, the jury had the choice of accepting Price's version of the facts

or accepting the testimony of Ciulla. As to Price and all the present defendants, the jury chose to believe Ciulla, knowing that he was a paid informer, that he had something to gain from his testimony, that he had engaged in various criminal activities for all of his adult life, that he participated in acts of violence and deception, and that he was immune from prosecution for his role in this scheme.

Against this backdrop, Ciulla's testimony was not unbelieveable on its face nor would it have been rendered unbelieveable by the addition of this further information. It was plausible and corroborated and I cannot say it could not have been believed by a reasonable jury. Nor can I say that there is any reasonable likelihood the material offered in support of this motion might have resulted in a different verdict as to any of the defendants. Basically, it was merely cumulative and impeaching material.

We should deal also with assertions that the government "assured" the jury that Ciulla was testifying completely and truthfully. Credibility of the witness' testimony is to be determined by the jury. *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966); *United States* v. *Curtis*, 520 F.2d 1300, 1304 (1st Cir. 1975). It is not improper to argue that the witness should be believed, or disbelieved. To the extent that a government agent was allowed to testify that he believed Ciulla did not lie to him, that agent was called to the stand by counsel for one defendant and the precise question which elicited the answer was put by counsel for another defendant.

One final note is required. Even if the defendants made a specific request for this particular material, there is no constitutional duty for a prosecutor to routinely turn over his entire file to the defense, *United States* v. *Agurs*, *supra*. During the course of these proceedings, it was clear to all, or should have been, that Ciulla had been engaged in multiple schemes and was being investigated by law enforcement agencies at the

local, state and federal level. He had been interviewed by township authorities, state police detectives and federal agents and the investigations ranged from fixing races to drugging horses and bribery of racing officials. Various understandings and agreements were made that an investigation that centered on one state would not involve details unrelated to that investigation. For example, it was elicited on cross-examination that Las Vegas was not to be mentioned as part of the New Jersey prosecution, because Las Vegas was not a part of the New Jersey operation. Similarly, part of the Pocono Downs operation was financed by another group, or by Ciulla himself and not by the Winter group entirely.

Under circumstances such as these, given the magnitude and complexity of the various prosecutions, the government's failure to respond to the blanket request for information made at pre-trial, as well as the particular information requested here, was not improper.

The motions for new trial filed by all defendants are denied.

United States District Judge

Supplemental Brief

Office - Supreme Court, U.S.
FILED
JUN 8 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1389

In the Supreme Court of the United States

OCTOBER TERM, 1981

MELVIN GOLDENBERG,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONER MELVIN GOLDENBERG

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SUPPLEMENTAL BRIEF FOR PETITIONER MELVIN GOLDENBERG

This Supplemental Brief is filed by the Petitioner Melvin Goldenberg pursuant to Rule 22.6 to call the attention of the Court to a new decision of the United States Court of Appeals for the First Circuit handed down on May 24, 1982 while the present Petition for a Writ of Certiorari is pending.

The decision is in the case of *United States of America* v. *Victor Angelini*, __ F.2d __. No. 81-1720. The decision is not as yet reported. A copy of the slip opinion is attached to this Supplemental Brief.

This new decision of the First Circuit relates to the Petitioner's argument that the trial judge had incorrectly instructed the jury on the significance of the substantial good character evidence which Petitioner presented. The Petitioner had requested that the Court instruct the jury that evidence of good character "standing alone" may be enough to raise a reasonable doubt of guilt, and thus be the basis for the acquittal of the Defendant. In requesting that instruction, the Petitioner relied on the decision of this Court in *Michelson* v. *United States*, 335 U.S. 469 (1948). The District Court refused to give the requested instruction but the Court of Appeals in its affirming opinion acknowledged a conflict of circuits on this issue. As to the Petitioner's entitlement to such an instruction, however, the Court of Appeals concluded that "[un]fortunately for Goldenberg, this Circuit has placed itself in the...camp" refusing the "standing alone" instruction. *United States* v. *Winter*, __ F.2d __, (1st Cir. 1981). (App. 51-A).

The entire argument of the Petitioner, detailing a serious split of Circuit Courts with respect to this issue, is set forth in the Petition, pages 6-11 as the first Reason for Granting the Writ.

In the Brief for the United States in Opposition to the Petition, the Government conceded, on pages 14-18, that there was a conflict of Circuits on the question of whether a defendant is entitled to the "standing alone" instruction, but argued that the question does not merit review.

The decision in *Angelini* now appears to place the First Circuit within the group of Circuits adhering to the "standing alone" instruction. The holding of the Court, in reversing a conviction in which the trial judge had refused to allow character witnesses to testify at all, stated the following:

> "We hold, therefore, that the trait of lawabidingness was relevant and admissible under Rule 404(a). We cannot say that the exclusion of this evidence was harmless error.

Cf. *Michelson* v. *United States*, 335 U.S. at 476 (evidence of good character may in itself raise a reasonable doubt as to defendant's guilt). We therefore remand for a new trial." *United States* v. *Angelini*, Slip Opinion, pp. 4-5.

The significance of the quotation from *Angelini* set forth above is that it includes a citation adopting the *Michelson* "standing alone" instruction in a decision rendered *after the decision in the present case and during the pendency of the Petition for Writ of Certiorari*. Such a citation reflects either a change in the view by the First Circuit, from which the Petitioner Goldenberg should be entitled to benefit, or a further manifestation of the confusion in the First Circuit with respect to this issue. Either circumstance constitutes an enhanced basis for the grant of the Writ of Certiorari so that District Judges in all Circuits, and particularly in the First Circuit, will be clearly advised as to the appropriate instruction in this sensitive area of federal criminal practice. As argued in the Petition, this is a subject on which defendants are entitled to national uniformity; *a fortiori* they deserve uniformity of treatment within a Circuit.

For this additional reason, and prompted by the intervening decision in *Angelini*, the Petitioner Melvin Goldenberg reiterates his Reason I. for Granting the Writ and suggests that, in the alternative to a full grant of the writ in this case, the Court may appropriately remand the case to the United States Court of Appeals for the First Circuit for reconsideration of its decision with respect to the good character instruction in the light of its intervening decision in *United States* v. *Angelini*.

Respectfully submitted,

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ADDENDUM

United States Court of Appeals
For the First Circuit

No. 81-1720

UNITED STATES OF AMERICA,

APPELLEE,

v.

VICTOR ANGELINI,

DEFENDANT, APPELLANT.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. A. DAVID MAZZONE, *U.S. District Judge*]

Before
COFFIN, *Chief Judge*,
FAIRCHILD,* *Senior Circuit Judge*,
and CAMPBELL, *Circuit Judge*.

Michael F. Natola, with whom *Alfred Paul Farese*, was on brief, for appellant.

Janis H. Kockritz, Attorney, Department of Justice, with whom *William F. Weld*, United States Attorney, and *Ernest S. DiNisco*, Special Attorney, Department of Justice, were on brief, for appellee.

May 24, 1982

CAMPBELL, *Circuit Judge*. Victor Angelini was convicted after a jury trial of possessing with intent to distribute and distributing methaqualone, a controlled substance, in violation of 18 U.S.C. §§ 841(a)(2), 2. The evidence presented against him at trial consisted primarily of the testimony of Drug Enforcement Administration Special Agent Keefe.

* Of the Seventh Circuit, sitting by designation.

Agent Keefe testified that, while working undercover, he met with one Samuel Jacobs on October 7, 1980, at which time Jacobs informed him of a new drug source from Florida. Jacobs arranged for Keefe to meet the source on October 14. Angelini was introduced as the drug source at this meeting. According to Keefe, Angelini stated that he could obtain various drugs. Angelini also asked Keefe about a small sample of drugs he, Angelini, had given Jacobs. Angelini went on to quote a price for shipments of the drugs.

The defense consisted chiefly of Angelini's denials of what Keefe said transpired at the October 14 meeting. He said that he was not involved in drugs and that while the general subject of drugs may have come up at the meeting, he did not engage in any criminal activity. Angelini's wife also testified on his behalf that he was not involved in drug trafficking.

Angelini sought to introduce evidence through three character witnesses that he was law-abiding and truthful. The district court refused to allow the witnesses to take the stand on the basis that law-abidingness was not relevant to the case; no explicit distinct explanation was given as to the basis of the ruling with respect to truthfulness. On appeal, Angelini asserts that these rulings were in error. While we do not believe it was error for the district court to have excluded the evidence concerning truthfulness, *see* note 1, *infra*, we hold that the court erred in excluding evidence concerning Angelini's character as a law-abiding person.

Federal Rule of Evidence 404(a) states that an accused may introduce "[e]vidence of a pertinent trait of his character." The word "pertinent" is read as synonymous with "relevant." *United States* v. *Staggs*, 553 F.2d 1073, 1075 (7th Cir. 1977); 22 Wright & Graham, *Federal Practice and Procedure: Evidence* § 5236, at 383 (1978). Thus, the basic issue is whether the character trait in question would make any fact "of consequence to the determination" of the case more or less probable than it would be without evidence of the trait. *See* Fed. R. Evid. 401; *United States* v. *Staggs*, 553 F.2d 1073.

Under this analysis, evidence of law-abidingness should have been admitted. Evidence that Angelini was a law-abiding person would tend to make it less likely that he would knowingly break the law. Such evidence has long been recognized as relevant. *See* 1 Wigmore, *Evidence* § 55 (Chadbourne rev. 1972). In *Michelson* v. *United States*, 335 U.S. 469 (1948), the Supreme Court stated that "[p]ossession of... characteristics [including law-abidingness] would seem... incompatible with offering a bribe to a revenue agent," which was the crime charged. *Id.*, at 483. Similarly, in *State* v. *Padgett*, 93 W. Va. 623, 117 S.E. 493, 495 (1923), the court stated

> A law-abiding trait of character would tend to negative indulgence in the propensity of making moonshine liquor, and that was the nature of the inquiry attempted to be made.

The observations made in these cases apply with equal force to the drug offenses charged here.

In a case directly on point, *United States* v. *Hewitt*, 634 F.2d 277 (5th Cir. 1981), the Fifth Circuit held that evidence of a defendant's law-abiding character was erroneously excluded in a trial for unlawful possession or receipt of firearms. In the course of its analysis, the court stressed the relevancy of such evidence, *Id.*, at 279. As it noted, however, this inquiry does not end the matter. While the *Hewitt* court went on to ask whether law-abidingness is a "specific" or a "general" trait of character, we think the issue may be better framed as whether it qualifies as a trait at all, or is so diffuse as to be merely synonymous with good character generally, which is not admissible. Rule 404 permits evidence of traits only; an earlier draft was modified, deleting language that would have allowed the introduction of evidence of a defendant's character generally. *See* Advisory Committee's Note to Rule 404; Proposed Federal Rules of Evidence 4-04(a)(1), 46 F.R.D. 161, 227 (1969). Under the common law, there was a

similar distinction made between general good character and particular traits of character. *See* McCormick, *Evidence* § 191, at 455 (2d ed. 1972); 1 Wigmore, *Evidence* § 59, at 458; 22 Wright & Graham, *Federal Practice and Procedure: Evidence* § 5236, at 382. Since Rule 404 was intended to restate the common law rule, 2 Weinstein & Berger, *Evidence* ¶ 404[05] (1981), it is useful to examine the cases to deterinme whether evidence of law-abidingness was normally held to be admissible.

With very few exceptions, the cases hold that evidence of a defendant's character as a law-abiding person is admissible. *See, e.g., State* v. *Padgett*, 93 W. Va. 623, 117 S.E. 493; *State* v. *Quinn*, 344 Mo. 1072, 130 S.W.2d 511 (1939); *Bishop* v. *State*, 72 Tex. Crim. 1, 160 S.W. 705 (1913); *Livingston* v. *State*, 589 S.W.2d 395 (Tex. Crim. 1979); *State* v. *Ervin*, 22 Utah 2d 216, 451 P.2d 372 (1969); *Finnie* v. *State*, 264 Ark. 638, 593 S.W.2d 32 (1980). *See also, e.g., United States* v. *Jalbert*, 504 F.2d 892, 895 (1st Cir. 1974) ("character evidence is admissible . . . to show a party's general renown for honesty and lawfulness"); *Commonwealth* v. *Nagle*, 157 Mass. 554, 32 N.E. 861, 862 (1893) ("unwillingness to commit crimes generally" apparently assumed a proper subject for character evidence). The only case we have found squarely stating that evidence of law-abidingness is generally inadmissible is *Chung Sing* v. *United States*, 4 Ariz. 217, 36 P. 205 (1894), but there is very little discussion of the issue. There is no indication of a general common law rule against the admissibility of evidence of law-abidingness (as distinguished from good character generally which, as noted, was usually held inadmissible).

We hold, therefore, that the trait of law-abidingness was relevant and admissible under Rule 404(a). We cannot say that the exclusion of this evidence was harmless error. *Cf. Michelson* v. *United States*, 335 U.S. at 476 (evidence of good

character may in itself raise a reasonable doubt as to defendant's guilt). We therefore remand for a new trial.[1]

Vacated and remanded.

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[1] As guidance for the district court on retrial, we note our rejection of Angelini's argument that he should have been permitted to introduce evidence of his character for truthfulness. If not pertinent to the crime charged — and Angelini does not argue that it is — such evidence is admissible "only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise." Fed. R. Evid. 608(a). The mere fact that an accused takes the stand does not give him the right to present character evidence supporting his veracity. *United States* v. *Jackson*, 588 F.2d 1046, 1053 (5th Cir.), *cert. denied*, 442 U.S. 941 (1979). Nor does contradiction of a witness, even the accused, necessarily require the admission of proffered evidence for truthfulness. *Id.* The cross-examination of Angelini conducted here could hardly be characterized as so "slashing," McCormick, *Evidence* § 49, at 104, as to constitute an attack on credibility under Rule 608. While the retrial may take a different course, necessitating a different approach by the presiding judge, we see no error in the exclusion of the evidence under the circumstances which obtained at the trial now under consideration.

Opposition

Supreme Court, U.S.
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Nos. 81-1389, 81-1392, and 81-1394

In the Supreme Court of the United States

OCTOBER TERM, 1981

MELVIN GOLDENBERG, PETITIONER
v.
UNITED STATES OF AMERICA

HOWARD T. WINTER, PETITIONER
v.
UNITED STATES OF AMERICA

ELLIOT PAUL PRICE, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the giving of a jury instruction on intent that was found unconstitutional in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), may constitute harmless error.

2. Whether the district court erred in its admission into evidence of co-conspirator declarations.

3. Whether the courts below correctly found that exculpatory evidence withheld by the prosecution was of no significant benefit to the defense.

4. Whether the district court properly refused to instruct the jury that character evidence standing alone could raise a reasonable doubt as to a defendant's guilt (No. 81-1389 only).

5. Whether the district court properly excluded defense evidence of the results of a polygraph examination (No. 81-1394 only).

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the court of appeals affirming petitioners' convictions (81-1394 Pet. App. A1-A65) and the denial of their new trial motions (81-1394 Pet. App. A69-A83) are reported at 663 F. 2d 1113 and 1120.[1] The opinion of the district court denying new trial motions (Pet. App. A85-A94) is unreported.

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[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 81-1394.

JURISDICTION

The judgment of the court of appeals was entered on October 30, 1981. Petitions for rehearing were denied on November 25, 1981 (Pet. App. A66, A84). The petitions for a writ of certiorari were filed on January 22, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On February 7, 1979, a 51-count indictment was returned in the District of Massachusetts, charging petitioners and 18 other individuals[2] with various racketeering and sports bribery offenses. Count 1 charged petitioners and all but one of the other defendants with conspiracy to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(d). Count 2 charged petitioner Winter and several others with the substantive racketeering offense, in violation of 18 U.S.C. 1962(c). Counts 3 through 22 charged various defendants with 20 separate instances of sports bribery, in violation of 18 U.S.C. 224. Counts 23 through 51 charged various defendants with interstate travel or use of a facility in interstate commerce with intent to carry on sports bribery or to distribute the proceeds of the bribery scheme, in violation of 18 U.S.C. 1952 (Travel Act) (Pet. App. A3-A8).[3]

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[2]In addition to petitioners, five others were eventually tried, three of whom also appealed their convictions—James Martorano, James DeMetri, and Charles DeMetri. The court of appeals affirmed the convictions of James Martorano, and he has not filed a petition for certiorari. The court of appeals reversed the convictions of James and Charles DeMetri (Pet. App. A31-A34, A65). Co-defendant Sidney Tildsley was convicted and did not appeal, and Norman Mercier was acquitted on all charges. Seven other co-defendants pleaded guilty. Charges against two others were dismissed, and four of those indicted remain fugitives.

[3]The original indictment was reduced to 42 counts by the time it reached the jury (Pet. App. A3).

Following a 46-day jury trial, petitioner Winter was convicted on Counts 1 and 2, all 20 counts of sports bribery, and 18 Travel Act counts; petitioners Price and Goldenberg were convicted on Count 1, six counts of sports bribery, and 11 Travel Act counts. Petitioner Winter was sentenced to concurrent terms of ten years' imprisonment on Counts 1 and 2 and five years' imprisonment on each of the remaining counts; he was also fined $10,000. Petitioners Price and Goldenberg were each sentenced to concurrent terms of two years' imprisonment on each count; each was also fined $10,000.[4]

The evidence at trial established that between December 1973 and November 1975 petitioners and a group of others engaged in a widespread scheme of fixing thoroughbred horse races at East Coast tracks, and then betting on the fixed races, both at the track and through illegal off-track bookmakers throughout the country (Pet. App. A9-A16). The operation centered on the activities of unindicted co-conspirator Anthony Ciulla, who testified for the government under an informal immunity agreement (4 Tr. 153-156, 194-196).[5]

The race-fixing enterprise was launched in late 1973, in a series of meetings in Somerville, Massachusetts, between Ciulla and a group headed by petitioner Winter. It was agreed that Ciulla, who had been fixing horse races for many years, would travel with a partner to various tracks and handle all the arrangements for fixing the races by bribing jockeys to keep their horses from winning. Ciulla would also be in charge of the betting that was done at the track on the fixed races. Winter and his partners would

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[4]On February 17, 1982, the district court reduced the sentences of petitioners Price and Goldenberg from two years' imprisonment and fine to two years' probation and fine.

[5]"Tr." refers to the trial transcript, separately paginated in each volume.

provide financing, supply runners to the race tracks, arrange bets on the fixed races with illegal bookmakers, and collect the winnings from the bookmakers. (4 Tr. 161-175.) It was further agreed that the profits from this scheme would be divided equally between Ciulla's end of the operation and Winter's group (4 Tr. 166-167).

Winter then put Ciulla in touch with petitioners Price and Goldenberg in Las Vegas, whose role would be to use illegal bookmakers there to "move" large amounts of money on the fixed races (4 Tr. 171-172). In early 1974, Ciulla traveled to Las Vegas, where he met with Price and Goldenberg. He talked with each of them about the amounts of money they would be able to wager with illegal bookmakers and the best tracks at which to operate (5 Tr. 28-35, 41-43).

The group then proceeded with the scheme, with Ciulla choosing the races and, through intermediaries, bribing the jockeys and placing bets at the tracks (*e.g.*, 5 Tr. 12-15, 105-129; 6 Tr. 85-86, 137-152; 8 Tr. 183-204).[6] The 20 counts in the indictment alleging sports bribery—on all of which petitioner Winter was convicted—charged that 20 separate races were fixed between August 12, 1974, and August 6, 1975, at tracks in New Jersey, Pennsylvania, Rhode Island, New Hampshire, and Massachusetts (Pet. App. A11-A12).

In order to arrange the betting outside the track, Ciulla would telephone Winter and his associates in Somerville, and sometimes Price and Goldenberg in Las Vegas, to inform them in advance which race he expected to fix. Then he would call again shortly before the race to tell them which of the remaining "live" horses to bet on with illegal bookmakers. (*E.g.*, 6 Tr. 148-149, 177-181, 205-208; 7 Tr. 18-20; 8 Tr. 166-169, 193-198; 9 Tr. 3-9, 33-37.)

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[6]On two occasions after a jockey had accepted a bribe but failed to hold his horse back, Ciulla, at petitioner Winter's direction, arranged a meeting at which the jockey was physically assaulted (5 Tr. 130-142; 6 Tr. 211-224).

The combined winnings—from both the "inside" and "outside" betting—were often quite substantial (Pet. App. A13, A14-A15). Petitioners Price and Goldenberg each transferred "outside" winnings of $100,000 to Ciulla during a trip he made to Las Vegas in February 1975 (Pet. App. A15; 8 Tr. 74-80).

An additional part of the race-fixing scheme involved the purchase of a high-quality race horse and measures taken to conceal its real abilities in several races so that the odds would permit large winnings when bets were placed on it in a race in which it was not held back (Pet. App. A11, A14-A15).

Although a substantial portion of the government's evidence consisted of the testimony of Anthony Ciulla, his testimony was corroborated by means of numerous telephone toll records of calls between Ciulla and the various members of the race-fixing scheme on or near the dates of the charged races (Gov. Exhs. 60, 61, 62A, 62B, 64, 65, 66, 67A, 67B, 69, 70, 82A-82J). In addition, several jockeys and trainers corroborated Ciulla's testimony (21 Tr. 37-47; 22 Tr. 23-37, 43-53, 57-58, 77-101, 113-115, 147-150; 23 Tr. 120-134; 25 Tr. 3-15), as did several state police officers who had conducted surveillance of Ciulla and his associates while they were fixing races at tracks in Pennsylvania and New Jersey (25 Tr. 49-60, 69-74; 26 Tr. 52-73).

The defense case consisted principally of denials of the allegations and attacks on Ciulla's credibility through impeaching his character and demonstrating inconsistencies and inaccuracies in such details of his testimony as the precise dates on which certain meetings were said to have occurred (Pet. App. A18-A20).

ARGUMENT

1. Petitioners contend (81-1389 Pet. 19-21; 81-1392 Pet. 15-17; 81-1394 Pet. 38-39) that this Court should grant

review in order to resolve the question whether the jury instruction found unconstitutional in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979), can ever be considered harmless error.

In *Sandstrom*, decided when the present case was still in trial, the Court held unconstitutional a jury instruction on criminal intent that " '[t]he law presumes that a person intends the ordinary consequences of his voluntary acts.' " 442 U.S. at 513. The Court reasoned (*id.* at 517-519) that the jury could have construed the instruction as shifting the burden of proof on criminal intent to the defendant or as establishing criminal intent without proof of that element of the crime. Had the jury acted on either of these understandings of the instruction, the Court concluded (*id.* at 521), it might have convicted the defendant without proof beyond a reasonable doubt on each element of the crime, and, in that case, deprived him of due process of law (*id.* at 524). The Court reversed and remanded, leaving open the question whether the erroneous instruction could have constituted harmless error, because the state court had not considered that issue (*id.* at 526-527).

The trial court's charge to the jury in this case included the following instruction on intent (41 Tr. 24): "As far as intent is concerned, you are instructed that a person is presumed to intend the natural and probable or ordinary consequences of his acts." The court of appeals found this instruction erroneous under *Sandstrom* (Pet. App. A41-A43) but concluded (*id.* at A43-A45) that it was harmless beyond a reasonable doubt here because, given the nature of the defenses, criminal intent was irrelevant to the issues in the case. The court pointed out (*id.* at A44) that, unlike the defendant in *Sandstrom*, who admitted killing the deceased but contended that he had not done so "purposely" (442 U.S. at 512-513), petitioners "are not claiming that they did

not intend the natural and probable or ordinary consequences of their acts" (Pet. App. A44) but rather simply "deny doing what the Government has alleged that they did" (*ibid.*). The court of appeals therefore could find "no reasonable possibility" that this instruction "contributed to [petitioners'] convictions" (Pet. App. A45).

We submit that the court of appeals' analysis is clearly correct; but we note that this Court has recently granted review in a case (*Connecticut* v. *Johnson*, cert. granted, No. 81-927 (Feb. 22, 1982)) raising the question whether the jury instruction condemned in *Sandstrom* can ever constitute harmless error. Therefore the Court may wish to hold the present petitions pending the decision in *Connecticut* v. *Johnson*. Should the Court hold that the *Sandstrom* instruction can never be harmless error, reversal of petitioners' convictions would be required. On the other hand, should the Court decide that such an instruction may, in appropriate circumstances, constitute harmless error, then the court of appeals' decision of this issue should be allowed to stand.

2. Petitioners also contend (81-1389 Pet. 12-18; 81-1392 Pet. 13-15; 81-1394 Pet. 15-26) that the district court erred in its admission into evidence of co-conspirator declarations. They argue that the district court considered such declarations themselves in determining whether there was sufficient evidence to warrant admitting them and that a conflict among the circuits exists as to whether this procedure is proper. They also argue that the court of appeals allowed a violation of its own rule regarding the timing of the district court's admissibility ruling. Neither of these arguments presents an issue meriting review because both rest on misreadings of the decisions below and because it is clear that the co-conspirator declarations could be properly admitted under the rules petitioners contend are applicable.

a. In *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942), decided before the enactment of the Federal Rules of Evidence, the Court stated that declarations by a member of a conspiracy "are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence [citations omitted]." Since the enactment of the Federal Rules, however, there has been some question whether, in light of Fed. R. Evid. 104, the *Glasser* requirement of independent evidence of a conspiracy has been overruled, so that the trial judge, when making his decision whether to admit co-conspirator declarations under Fed. R. Evid. 801(d)(2)(E), may consider the declarations themselves in addition to other evidence. Indeed, the language of Fed. R. Evid. 104(a), specifically stating that the court is not bound by any rules of evidence except those with regard to privileges in making determinations of admissibility, does suggest that the court could consider hearsay, including the very statement in question, in determining whether the criteria for admissibility in Rule 801(d)(2)(E) have been met.

Only the First Circuit, however, has concluded that the new rules do indeed allow the court to consider the co-conspirator statements themselves to prove the existence of a conspiracy. *United States* v. *Martorano*, 557 F. 2d 1, 11-12 (1977), cert. denied, 435 U.S. 922 (1978). The other courts have held to the view that the judge may consider only evidence independent of the statement. *E.g., United States* v. *James*, 590 F. 2d 575, 581 (5th Cir.) (en banc), cert. denied, 442 U.S. 917 (1979); *United States* v. *Andrews*, 585 F. 2d 961, 966 (10th Cir. 1978); *United States* v. *Ziegler*, 583 F. 2d 77, 79 (2d Cir. 1978); *United States* v. *Bell*, 573 F. 2d 1040, 1044 (8th Cir. 1978). Thus, there does appear to be a conflict among the courts on this issue. However,

contrary to petitioners' claim, resolution of this conflict would have no effect on the outcome of this case.

Although petitioners rely on language of both the court of appeals and the district court referring to "801(d)(2) statements" as having been considered in the decision allowing admission of the co-conspirator statements (see Pet. App. A36), it is in fact clear from the entire quoted sentence that the district court explicitly found sufficient *independent* evidence to support admission of the co-conspirator statements. The relevant portion of the district court's finding, which was quoted by the court of appeals, was as follows (21 Tr. [A] 25):

> I find that each defendant and each coconspirator had been involved sufficiently by nonhearsay evidence, including 801(d)(2) statements, which sufficiently indicate their involvement in this criminal enterprise.

The court's reference to "nonhearsay evidence, including 801(d)(2) statements," clearly meant the statements made by each defendant himself, which are not hearsay and are independently admissible against each declarant under Fed. R. Evid. 801(d)(2)(A) as admissions. See *United States* v. *Franklin*, 586 F. 2d 560, 568 & n.14 (5th Cir. 1978), cert. denied, 440 U.S. 972 (1979).

Indeed, the record adequately supports the court's finding that evidence independent of the co-conspirator declarations sufficiently showed the existence of a conspiracy and each defendant's membership in it. As to petitioner Winter, there was ample independent evidence of a conspiracy and his participation in it from his own statements and actions, as reported by Ciulla (*e.g.*, 4 Tr. 163-171; 5 Tr. 123-127, 141-142; 6 Tr. 187-194; 8 Tr. 43-46, 87-89; 9 Tr. 129-130),[7] as well as from various telephone toll records and

[7]The district court specifically found that for purposes of his ruling on admissibility, he regarded Ciulla's testimony as credible (21 Tr. [A] 22, 34).

other evidence corroborating Ciulla's testimony (22 Tr. 30-37, 43-50; 25 Tr. 28-43; 26 Tr. 54-73; 27 Tr. 72-80).

Similarly, with regard to petitioners Goldenberg and Price, evidence of each one's own statements and actions demonstrated his knowledge of and participation in the conspiracy (*e.g.*, 5 Tr. 28-34, 41-43, 46-48, 57-63, 199-206, 210-221; 8 Tr. 71-82, 149, 152, 154, 196-198). All of this evidence was independent of the co-conspirator declarations, and it was clearly sufficient to meet the threshold evidentiary standard that it was more likely than not that a conspiracy existed. See *United States* v. *Petrozziello*, 548 F. 2d 20, 23 (1st Cir. 1977).

b. Petitioners also argue that the court of appeals erroneously countenanced a violation of a First Circuit rule—announced in *United States* v. *Ciampaglia*, 628 F. 2d 632, 638, cert. denied, 449 U.S. 956 (1980), after the trial in this case—requiring that rulings on the admissibility of co-conspirator declarations be made only at the close of all the evidence, so as to permit a "preponderance of the evidence" determination based on the evidence of both the prosecution and the defense. The court of appeals reaffirmed its *Ciampaglia* rule, but concluded (Pet. App. A37-A38, A66-A67) that the trial court did not commit reversible error in ruling on the admissibility of the co-conspirator declarations in mid-trial, before the close of the government's case.

Whether this holding constituted a departure from the First Circuit's own rule is not a question appropriate for review in this Court (see *Wisniewski* v. *United States*, 353 U.S. 901 (1957)), but, in any event, the court of appeals demonstrated that its holding did not represent a rejection of *Ciampaglia*. First, as the court noted (Pet. App. A37), the trial court did not have the benefit of the *Ciampaglia* decision when it made the premature ruling in question, and

defense counsel did not request a reconsideration of the ruling when all the evidence had been presented.

Most significantly, the court concluded (Pet. App. A66-A67, A38 n.36) from the trial court's decision to permit the conspiracy charge to go to the jury that the trial court would have made the same ruling on the admissibility of the co-conspirator declarations *after* all the evidence was in as it had earlier, *i.e.*, that, in light of the instructions to the jury and the trial judge's evident understanding of what evidence could be considered in determining whether a defendant had participated in the conspiracy, "it is apparent that he would not have permitted the jury to consider the hearsay evidence if he had changed his mind and come to the conclusion that a preponderance of the evidence no longer supported the finding of a conspiracy." The court of appeals thus properly declined to reverse petitioners' convictions on the basis of this inconsequential deviation from the subsequently announced *Ciampaglia* rule.[8]

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[8]The further argument of petitioners Price and Goldenberg that the court of appeals departed from the proper standard of harmless error, as adopted in *Chapman* v. *California*, 386 U.S. 18 (1967), is also without merit. First, the court of appeals' holding that any error in the timing of the ruling on admissibility was not "reversible error" was not a clear departure from the *Chapman* standard that a constitutional error must be found harmless beyond a reasonable doubt. *Id.* at 23-24. By finding that the court's ruling would not have changed if made at the correct time, the court implicitly found no reasonable possibility that the error had contributed to the conviction. Furthermore, since the court found that the substance of the ruling admitting the co-conspirator statements was correct, the error in timing was not one implicating any constitutional rights; therefore, it would have been appropriate in any event to judge such an error against the standard enunciated in *Kotteakos* v. *United States*, 328 U.S. 750, 764-765 (1946). That is, unless the error had a "substantial influence" on the conviction, the error must be considered harmless. Under this standard, any error here is even more certainly harmless.

3. Petitioners also contend (81-1389 Pet. 22-25; 81-1392 Pet. 10-13; 81-1394 Pet. 43-53) that the court of appeals applied the wrong legal standard under *United States* v. *Agurs*, 427 U.S. 97 (1976), in reviewing the prosecution's failure to turn over certain exculpatory information and therefore erred in affirming the district court's denial of petitioners' new trial motions based on that failure. The contention is without merit because the nature of the information was such that, whatever standard was applied, the prosecution's failure to provide it to the defense did not warrant granting a new trial.

In post-trial motions in the district court, petitioners contended that the government had failed to provide to the defense various materials of exculpatory significance, in violation of its obligation under *Brady* v. *Maryland*, 373 U.S. 83 (1963). Included in these materials were certain FBI reports (known as "302's") of interviews with Anthony Ciulla relating to race fixing in the Detroit, Michigan area. The district court denied the motions, finding as to the so-called "Detroit information" that it would not have affected the outcome of the trial (Pet. App. 85a-94a). That standard—as the district court noted (*id.* at A86)—is the standard specified in *Agurs* (427 U.S. at 104) as applicable in the case of information withheld in the face of a "specific" rather than "general" defense request.[9]

The court of appeals affirmed the denial of the new trial motions (Pet. App. A70-A83). It held that the Detroit information, although exculpatory, was not the subject of a specific request (*id.* at A71-A72), and that the proper test

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[9]Although the district court also stated (Pet. App. A86) that it did not consider any of the material "exculpatory," it nonetheless carefully considered the possible usefulness of the Detroit information to the defense and finally rested its denial of the new trial motions as to this information on an application of the *Agurs* possible-effect-on-the-outcome standard (*id.* at A88-A91).

under *Agurs* was whether, in the context of the entire record, the omitted material created a reasonable doubt that did not otherwise exist. 427 U.S. at 112.

Contrary to petitioners' argument, it is irrelevant in this case whether the court of appeals correctly determined that the defense request was general rather than specific.[10] It is clear from the detailed findings made by both the district court and the court of appeals with respect to the relevance of the Detroit information (Pet. App. A88-A91, A72-A76) that the information simply could not have been of any real benefit to the defense and that the failure of the government to turn it over does not, under either *Agurs* standard, warrant the grant of a new trial.

The court of appeals correctly rejected the contentions of petitioners Goldenberg and Price (see 81-1389 Pet. 24; 81-1394 Pet. 49) that the interviews with Ciulla in the Detroit investigation tended to refute Ciulla's testimony in petitioners' trial that he needed Las Vegas contacts (*i.e.*, petitioners Goldenberg and Price) to place large outside bets. The court pointed out (Pet. App. A75) that nothing in the Detroit interviews indicated that Ciulla himself had any such Las Vegas contacts and that any attempt to use the interviews in that respect "would have petered out to nothing." As to the revelations of Ciulla's prior criminality, such information was plainly of minimal impeachment value in a case such as this, in which, as the district court observed (*id.* at A91), the cross-examination of Ciulla alone "covered the better part of 9 days and inquiry was permitted into details of his past,

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[10]The district court's description of the request as specific (Pet. App. A86) may have simply reflected an assumption for purposes of the decision (see *id.* at A94), whereas the court of appeals' determination that the requests were general appears to be based upon an examination of the actual defense requests (*id.* at A74). Contrary to petitioners' contentions, the court of appeals is not without power to make its own determination of this question of legal characterization.

present, and future life." As the court of appeals noted (*id.* at A76), it was quite clear to the jury that Ciulla "was a crook," and "additional confirmation of Ciulla's dishonesty" could not have made "any difference in the jury's credibility assessment of his testimony."

In sum, whatever *Agurs* standard each court may have held to be applicable, the specific analysis of the Detroit information in which each court engaged reveals a basic agreement that the information simply did not possess the significance attributed to it by petitioners. That fact-bound determination does not merit further review.

4. Petitioner Goldenberg contends (81-1389 Pet. 6-11) that it was error for the district court to refuse to give a character evidence instruction in the particular form he requested. Although, as he further asserts (*id.* at 7-8), the courts of appeals disagree on whether a defendant is ever entitled to that particular instruction, this narrow question does not, in the circumstances of this case, warrant review by the Court.

In addition to testifying himself, Goldenberg called several character witnesses to testify on his behalf (see Pet. App. A47-A48). He requested that the judge give the following instruction on character evidence to the jury (*id.* at A48; emphasis added by court of appeals):

> The jury is instructed that evidence of an established reputation for honesty, veracity and integrity may be such to raise a reasonable doubt that will *alone* justify an acquittal. Proof of a good reputation for honesty, veracity and integrity of one indicted for an offense which by his [*sic*] very nature implies lack of moral rectitude *may well by itself, if believed by the jury, create such a reasonable doubt as to justify acquittal* notwithstanding the convincing nature of other evidence in the case.

The judge instead instructed the jury as follows (41 Tr. 18-19):

> Next there were character witnesses. There was evidence offered and admitted which tended to show the good reputation of a defendant in his community prior to the indictment in this case. Such evidence may indicate to you that it is improbable that a person of good character would commit the crimes charged, and, therefore, cause you to have a reasonable doubt.
>
> You should consider this evidence along with all of the other evidence in the case in determining the guilt or innocence of the defendant.

The court of appeals upheld the instruction as given by the trial court, reiterating its rule rejecting the use of the "standing alone" character instruction. *United States* v. *Lachmann*, 469 F. 2d 1043, 1046 (1st Cir. 1972), cert. denied, 411 U.S. 931 (1973). The court stated (Pet. App. A51): "We do not think it the proper function of the trial judge to instruct the jury as to the weight it can or may give to any particular evidence that it believes. Rather, it appears to us to be a usurpation of the jury's special function."

Petitioner Goldenberg argues that the instruction he requested was approved by this Court in *Edgington* v. *United States*, 164 U.S. 361, 366 (1896), and *Michelson* v. *United States*, 335 U.S. 469, 476 (1948) (dictum). As he correctly points out, the circuits are divided on the question whether *Edgington* and *Michelson* actually establish that the "standing alone" instruction should ever be given.

In *Edgington*, the Court was considering a charge on good character that instructed the jury that such evidence could be considered *only* if the rest of the evidence created a doubt about the defendant's guilt. In finding error in this instruction, the Court stated (164 U.S. at 366):

> Whatever may have been said in some of the earlier cases, to the effect that evidence of the good character of the defendant is not to be considered unless the other evidence leaves the mind in doubt, the decided weight of authority now is that good character, when considered in connection with the other evidence in the case, may generate a reasonable doubt. The circumstances may be such that an established reputation for good character, if it is relevant to the issue, would alone create a reasonable doubt, although without it the other evidence would be convincing.

Some courts have read this language as meaning (particularly in the light of dictum in *Michelson* v. *United States, supra*) that an accused is entitled to have the jury instructed that evidence of good character may by itself create a reasonable doubt.[11] Others, however, have felt free to disapprove a "standing alone" character evidence charge, viewing *Edgington* as striking down a limitation on the use of character evidence, not as requiring "that the lack of limitation

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[11] See, *e.g.*, *United States* v. *Callahan*, 588 F. 2d 1078, 1085 (5th Cir.), cert. denied, 444 U.S. 826 (1979); *United States* v. *Lewis*, 482 F. 2d 632, 637 (D.C. Cir. 1973) (dictum); *Oertle* v. *United States*, 370 F. 2d 719, 726-727 (10th Cir. 1966) (en banc), cert. denied, 387 U.S. 943 (1967); *United States* v. *Donnelly*, 179 F. 2d 227, 233 (7th Cir. 1950).

In *Michelson*, the Court, in the course of deciding the proper scope of cross-examination of a defendant's character witnesses, stated, citing *Edgington* (335 U.S. at 476):

> [The defendant] may introduce affirmative testimony that the general estimate of his character is so favorable that the jury may infer that he would not be likely to commit the offense charged. This privilege is sometimes valuable to a defendant for this Court has held that such testimony alone, in some circumstances, may be enough to raise a reasonable doubt of guilt and that in the federal courts a jury in a proper case should be so instructed.

must be expressly pointed out to the jury." *Carbo* v. *United States*, 314 F. 2d 718, 746 (9th Cir. 1963), cert. denied, 377 U.S. 953 (1964).[12]

Despite the conflict, the question does not merit review. No constitutional right is implicated in the question whether character evidence may be given special emphasis through a jury instruction that such evidence alone may raise a reasonable doubt, and it is unlikely that the presence or absence of the instruction would actually control the outcome of a case. Whether or not the instruction is given, a jury is free to give character evidence decisive weight. The formulation of appropriate rules on instructions such as this may properly be left to the individual circuits in the exercise of their supervisory powers. It is not a matter that demands national uniformity.

In any event, it is not clear that petitioner Goldenberg would have been entitled to the good character "standing alone" instruction even in those circuits that find the instruction permissible. *Edgington* stated only that "circumstances may be such" that a reputation for good character alone may create a reasonable doubt, and even some courts that would allow the instruction in some circumstances, do not find it mandatory when, for example, the defendant does not rest his defense solely on character evidence. *United States* v. *Foley*, 598 F. 2d 1323, 1336-1337 (4th Cir. 1979); *Oertle* v. *United States, supra*, 370 F. 2d at 727. Petitioner Goldenberg relied not only on character

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[12]The Second and Eighth Circuits also appear to share this view of *Edgington*. *United States* v. *Fayette*, 388 F. 2d 728, 737 (2d Cir. 1968); *Black* v. *United States*, 309 F. 2d 331, 343-344 (8th Cir. 1962), cert. denied, 372 U.S. 934 (1963).

As to the *Michelson* dictum, the court of appeals below suggested (Pet. App. A49 n.45) that the Court in that opinion had misread the effect of *Edgington*.

evidence but also on his own testimony denying Ciulla's allegations. He therefore has not established that the requested instruction would necessarily have been given had he been tried in a circuit that has adopted a reading of *Edgington* different from that of the court below.

5. Petitioner Price contends (81-1394 Pet. 26-38) that the court of appeals erred in affirming the trial court's refusal to allow him to present polygraph evidence in support of his credibility and that review should be granted because the circuits are divided on the question whether polygraph evidence should be admissible. In fact, despite the division among the circuits, the trial court's ruling in this case almost surely would have been affirmed in any circuit, so further review of the propriety of the trial court's ruling is not warranted.

Some circuits, noting the widely held view that "the polygraph does not command scientific acceptability and * * * is not * * * sufficiently reliable in ascertaining truth and deception to justify its utilization in the trial process" (*United States* v. *Alexander*, 526 F. 2d 161, 164 (8th Cir. 1975)), have declared polygraph evidence to be *per se* inadmissible. *E.g., United States* v. *Clark*, 598 F. 2d 994, 995 (5th Cir. 1979); *United States* v. *Russo*, 527 F. 2d 1051, 1058-1059 (10th Cir. 1975), cert. denied, 426 U.S. 906 (1976); *United States* v. *Skeens*, 494 F. 2d 1050, 1053 (D.C. Cir. 1974). Others have decided against such a *per se* exclusion, but they have nonetheless indicated that a trial judge has broad discretion in the matter and that his refusal to admit polygraph evidence will rarely, if ever, constitute reversible error. See, *e.g., United States* v. *Truong Dinh Hung*, 629 F. 2d 908, 930 n.27 (4th Cir. 1980); *United States* v. *Glover*, 596 F. 2d 857, 867 (9th Cir.), cert. denied, 444 U.S. 860 (1979); *United States* v. *Mayes*, 512 F. 2d 637, 648 n.6 (6th Cir.), cert. denied, 422 U.S. 1008 (1975). See also *United States* v. *Kampiles*, 609 F. 2d 1233, 1244 (7th

Cir. 1979) (emphasizing broad discretion of trial court while upholding admission of polygraph evidence for purpose other than accuracy of the results).[13]

In the present case the court of appeals found it unnecessary to decide "whether a *per se* prohibition against the use of lie detector tests is appropriate" because it concluded (Pet. App. A55) that the "trial judge acted within his discretion in refusing to admit such evidence in this case." That holding is clearly reasonable. The jury had the benefit of Price's personal testimony denying his involvement in the race-fixing scheme. It was thus able to weigh his testimony directly against Ciulla's and to make its own judgment as to their relative credibility. Moreover, had petitioner Price been permitted to produce such evidence, other defendants and witnesses might have felt it necessary to seek to introduce such evidence so as not to appear to the jury to be avoiding such tests, whatever their reliability. It is surely within a court's discretion to avoid the prospect of either prejudice to other parties or a general "trial by polygraph," at least where there is no barrier to the defendant's taking

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[13]Petitioner Price seeks to rely (81-1394 Pet. 26-27) on *McMorris* v. *Israel*, 643 F. 2d 458 (7th Cir. 1981), cert. denied, No. 81-189 (Feb. 22, 1982), as conflicting not only with decisions applying a *per se* rule of exclusion but also with the decision in the present case. In fact, even assuming that *McMorris* was correctly decided, its rationale would not require a reversal of the trial court's polygraph ruling in this case. The court was considering a state court's refusal to receive polygraph evidence (1) when state law accepted such evidence as reasonably reliable under certain safeguards, (2) when such safeguards were present (*e.g.*, the defendant's willingness to stipulate, in advance of the test, that the results would be admissible no matter what they showed), and (3) when the only bar to the admission of the evidence was the prosecution's unexplained veto. The *McMorris* panel made it clear (643 F. 2d at 465, 466) that its decision was "closely linked" to "peculiarities" of the Wisconsin rule for stipulating the admissibility of polygraph evidence and that it was holding neither that the admission of polygraph evidence is constitutionally required nor "that a judge may not refuse to admit polygraph evidence in a particular case."

the stand in his own behalf and allowing the jury to judge his truthfulness. See Abbell, *Polygraph Evidence: The Case Against Admissibility in Federal Criminal Trials*, 15 Am. Crim. L. Rev. 29, 52-53 (1977).[14]

CONCLUSION

The petitions for a writ of certiorari should be denied with respect to all questions except the one concerning the jury instruction found unconstitutional in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). As to the latter question, the Court may find it appropriate to hold these petitions pending its decision in *Connecticut* v. *Johnson*, cert. granted, No. 81-927 (Feb. 22, 1982).

Respectfully submitted.

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[14]There is no merit to petitioner Price's assertion (81-1394 Pet. 31-32), in reliance on *McMorris* v. *Israel*, *supra*, that his due process rights were denied by the government's refusal to permit him to take a government-administered polygraph examination or to consent to a separate jury-waived trial for him at which the polygraph evidence might be admitted. The government's position did not rest on "solely * * * tactical reasons" like the prosecutor's veto condemned in *McMorris*. By asking that Price be tried together with the other alleged members of the race-fixing scheme, the government was considering both the undesirability of separate trials in a long, complicated case such as this and its own legitimate interest in having a case tried by a jury—an interest recognized in Fed. R. Crim. P. 23(a), which requires the government's consent to a defendant's waiver of trial by jury.